TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~122~~. 195

THE MAYOR AND ALDERMEN OF NASHVILLE, PLAINTIFFS IN ERROR,

vs.

GIBSON MERRITT ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED JANUARY 18, 1870.

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1 UNITED STATES OF AMERICA, *ss:*

To Gibson Merritt, Alfred G. Merritt, Frank Hagen & wife, (C. H. Hagen,) Nashville Building Association, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 6th circuit and middle district of Tennessee, wherein The Mayor & Aldermen of Nashville are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States Supreme Court, this the 19th day of November, in the year of our Lord 1869, and of the independence of the United States the 94th year.

[SEAL.] CONNALLY F. TRIGG,
U. S. District Judge Presiding.

Came to hand Dec. 4, 1869. Executed on John Ried, esq.,
2 attorney of record of Gibson Merritt, A. G. Merritt, Frank Hagan & his wife, (C. H. Hagan,) Dec. 4, 1869.

E. R. GLASCOCK,
U. S. Marshal Mid. Dist. of Tenn.

(Indorsed:) Gibson Merrill et als. vs. The Mayor & Aldermen of Nashville. Citation.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the sixth circuit and district of Middle Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States for the middle district of Tennessee before you, between Gibson Merritt et als and The Mayor & Aldermen of Nashville, as by their complaint appears, a manifest error hath happened, to the great damage of the said Mayor & Aldermen of Nashville; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held; that, the record and proceedings
4 aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this the 27 day of November, 1869, and of the independence of the United States the 94th year.

[SEAL.] E. R. CAMPBELL, *Clerk.*

(Indorsed:) Gibson Merritt et als. vs. The Mayor & Aldermen of Nashville. Writ of error. Issued Nov. 27, 1869. E. R. Campbell, cl'k.

5 UNITED STATES OF AMERICA,
Middle District of Tennessee:

At a circuit court of the United States began and held in the federal court-room in the capitol in Nashville in and for the district aforesaid, on the third Monday, being the eighteenth day, of October, in the year of our Lord eighteen hundred and sixty-eight, and of the independence of the United States the ninety-fourth year—present, the Honorable Connally F. Trigg, judge of the United States district courts for the several districts of Tennessee—the following proceedings were had, to wit:

On the day of , 1868, the transcript of the records and proceedings had in the circuit court of Davidson County, Tennessee, in the cause in said court then depending of Gibson Merritt et als., plaintiffs, against The Mayor and Aldermen of the City of Nashville, defendants, was filed in the circuit court of the United States for trial of said cause, the same being transferred for trial to said United States circuit court for the reasons set forth in said transcript.

Transcript from State court.

GIBSON MERRITT ET ALS.	Transcript from circuit court of Davidson Co., Tenn.
vs.	
THE MAYOR & ALDERMEN OF NASHVILLE.	

STATE OF TENNESSEE:

6 Pleas at the court-house in the city of Nashville, county of Davidson, and State aforesaid, on the third Monday, being the 18th day, of May, in the year of our Lord one thousand eight hundred and sixty-eight, and in the ninety-second year of our American independence:

Present, the Hon. Eugene Cary, one of the judges of the circuit courts of the State of Tennessee, and assigned to hold the circuit courts of the ninth judicial district in said State.

Summons.

STATE OF TENNESSEE:

To the sheriff of Davidson County, greeting:

You are hereby commanded to summon The Mayor and Aldermen of the Town of Nashville, if to be found in your county, to be and appear before the judge of our ninth circuit, at the next circuit court to be held in the county of Davidson, at the court-house in the city of Nashville, on the first Monday in September next, then and there to answer Gibson Merritt in an action to his damage, fifty thousand dollars.

Herein fail not, and have then and there this writ.

Witness David C. Love, clerk of our said court, at office, this the fourth Monday in January, A. D. 1864, and in the eighty-eighth year of our independence.

DAVID C. LOVE, *Clerk.*

Bond.

7 Know all men by these presents that Gibson Merritt and Eli L. Woods are held and firmly bound unto the Mayor and Aldermen of the Town of Nashville in the sum of five hundred dollars, to be void on condition that the said Gibson Merritt do pay and satisfy all cost that may accrue in this behalf, in a prosecution of a suit this day

commenced by him in the circuit court for Davidson County, Tennessee, against the Mayor and Aldermen of the Town of Nashville, on failure of the plaintiff to prosecute said suit with effect, and also on failure of the defendant, if convicted, to pay said cost.

Witness our hands this 14th day of May, 1864.

GIBSON MERRITT.
ELI L. WOODS.

Issuance.

Issued 14th day of May, 1864.

Return.

I acknowledge legal service of this writ on defendants.
May 14, 1864.

JOHN HUGH SMITH, *Mayor.*

Declaration.

Circuit court, May term, 1864.

Original and amended declaration.

The plaintiff sues the defendants for fifty thousand dollars, as damages for a trespass by the defendants on the day of , 18, and on divers other days and times, on the following-described tract of land, belonging to and in the possession of the plaintiffs: Beginning at the
8 northwest corner of a tract of land formerly owned by John Rains, now deceased, lying in Davidson County, State of Tennessee, and near to and south of the city of Nashville; running thence east 176 poles to a stake; thence south 35° east 12 poles to a stake in the avenue; thence south 128 poles to a stake near the dwelling-house of John Rains, deceased; thence west 183 poles to a stake in the west boundary line of the tract owned by said Rains; thence north 38 poles to the beginning; containing 43 acres and 39 poles, said land being the part of land allotted to Jullie Merritt, now deceased, in the division of the estate of the said John Rains by the county court of Davidson, and registered in the book of wills, inventories, &c., No. 10, and pages 406, '7, & '8, and for cutting and carrying away the timber, treading down the grass, cutting up the soil by driving wagons across the same, &c.

And the plaintiffs sue the defendant also for fifteen thousand dollars, as damages for the conversion by the defendants, on the day of , 18 , of twelve hundred cords of wood, the property of the plaintiffs.

And the plaintiffs, by leave of the court first had and obtained, &c., further complain and say that heretofore, to wit, on the day
9 and year aforesaid, and on divers other days and times, in the county aforesaid, the said defendants became and were liable to pay to the plaintiffs the sum of thousand dollars for so much money paid before that time, in consideration of wood belonging to the plaintiff which had been sold by the defendants, which said money was so paid to the defendants to and for the use of the plaintiffs; and being so indebted, the defendants then and there undertook and promised to pay the plaintiffs said sum of money when thereto requested; yet, although often requested to pay, has hitherto failed, and still refuses to pay the same.

And the plaintiffs also sues the def'ts for thousand dollars, which they say was due from defendants, for thousand cords of wood sold to the defendants by the plaintiffs on the day of , 18 , at, &c., in the county aforesaid, for which wood defendants were to pay the market price; and the plaintiffs aver that said thousand cords of wood were worth in the market, at the time of said sale, the said sum of thousand dollars; and the defendants, being so indebted, under-
10 took and then and there promised the plaintiff to pay him said last-mentioned sum of money when thereunto requested; yet, although often requested to pay, has hitherto failed and still refuses to pay the same.

JOHN REID,
JORDAN STOKES,
Atto's for Plaintiffs.

Pleas.

In circuit court of Davidson County, September term, 1867.

1. And the said defendants come, by their attorneys, and defend the wrong and injury, when, &c., and for plea say that they are not guilty in manner and form as plaintiffs have in their said declaration alledged; and of this defendants put themselves upon the country.

2. And for further plea defendants say that they do not owe, as plaintiffs have in their said declaration alledged; and of this they put themselves on the country.

3. And for further plea defendants say that they did not undertake and promise in such manner and form as the said plaintiffs have in their said declaration alledged; and of this they put themselves on the country.

4. And for further plea defendants say that the said wrongs and injuries complained of were committed, if at all, by persons acting
11 under the military commands or orders of an officer or officers of the United States Army (during the late rebellion against the authority of the United States) having command of the department, district, or place where the said wrongs are alledged to have been committed; and that this action was not commenced by the said Alfred G. Merritt, Frank Hagan and his wife C. H. Hagan, and the Nashville Building Association, or any of them, except the said Gibson Merritt, for more than two years after the wrongs and injuries complained of were committed, and their said cause of action, if any, accrued; and not for more than two years after the third day of March, 1863; and therefore the said cause of action is barred as to them by act of Congress passed March 3, 1863, entitled "An act in relation to habeas corpus, and regulating judicial proceedings in certain cases," and by an act amendatory thereto, passed May 11, 1866; and upon said acts of Congress defendants expressly rely, and plead the same in bar of this action as *as* statute of limitation; and this the said defendants are ready to verify.

JOHN LELLYETT,
Attorney for Defendants.

12 *Issue.*

And the plaintiffs join issue upon the first, second, and third pleas of the defendants above pleaded.

REID & STOKES,
Att'ys for Plaintiffs.

Demurrer.

And as to the fourth and last plea of the defendants, the plaintiffs filed a demurrer upon several grounds; when, upon *argu*[gree]ment of the parties, the pl'ffs are allowed upon the trial of the case and *agree*-[rgu]ment before the court to rely upon the grounds of the objections set forth in the demurrer to said plea; and thereupon the plaintiffs withdraw the demurrer and join issue to said plea upon the footing of said agreement.

REID & STOKES,
Attorneys for Plaintiffs.
JOHN LELLYETT,
Att'y for Defendant.

At the September term, 1865, and on Monday, the fourth day of September, 1865, the following entry is made, to wit:

Amendment.

GIBSON MERRITT
vs.
MAYOR & ALDERMEN OF NASHVILLE. } Motion.

The plaintiff appears by his attorney, and on motion leave is
13 granted plaintiff to amend his writ and declaration in this cause, by making A. G. Merritt, F. Hagan and wife C. H. Hagan, parties plaintiffs to this suit.

And afterwards, to wit, at the January term, 1866, and on Thursday, March 8, 1866, the following entry is made:

Amendment.

GIBSON MERRITT
vs.
MAYOR & ALDERMEN OF NASHVILLE. } Motion.

In this cause, by consent of parties, it is ordered by the court that A. G. Merritt, F. Hagan and wife C. H. Hagan, and the Nashville Building Association be made parties plaintiffs to this cause.

And afterwards, to wit, at the September term, 1867, and on Wednesday, September 4th, 1867, the following entry is made:

Jury empannelled and respited.

GIBSON MERRITT ET AL.
vs.
MAYOR & ALDERMEN OF NASHVILLE. } Case, pleas, &c.

The parties appear, by their attorneys, and also a jury of good and lawful men, to wit, R. A. Barnes, Littleton Horn, Tyson Harris, E. B. Bigley, B. F. Myers, Felix Long, K. Ray, J. W. Bigley, Aquilla Price, A. T. Curl, Geo. W. Spain, and James T. Patterson, who, being elected,
14 tried, and sworn the truth to speak upon the issues joined, having heard the testimony in the cause, are, by consent of parties, respited from the further consideration of the same until the meeting of court to-morrow morning.

And again, to wit, at the same term, and on Thursday, the 5th day of September, 1867, the following entry is made:

GIBSON MERRITT ET AL. *vs.* MAYOR & ALDERMEN, &C. } Case, pleas, &c.

The parties again appear, by their attorneys, and also the jury heretofore empannelled in this cause, and who were on yesterday respited from the further consideration of the same until the meeting of the court this morning, now appeared in court, according to adjournment, and resumed its consideration; and having heard the testimony in the cause, the argument of the counsel on both sides, and the charge of the court, and not being able to agree upon a verdict, are by consent of parties again respited from the further consideration of this cause until the meeting of the court to-morrow morning.

And again, at the same term, and on Friday, Sept. 6, 1867, the following entry is made:

Judgment.

GIBSON MERRITT ET AL. *vs.* MAYOR & ALDERMEN OF NASHVILLE. } Case, pleas, &c.

15 The parties again appear, by their attorneys, and also the jury heretofore empannelled in this cause, and who were on yesterday respited from the further consideration of the same until the meeting of the court this morning, now appeared in court, according to adjournment, and resumed its consideration, on their oaths do say that they find the issues in favor of the defendant.

Therefore is it considered by the court that the defendants go hence without day, and recover of the plaintiffs and Eli L. Woods, their security on the bond given for the prosecution of this suit, their cost in this behalf expended, for which execution may issue.

And again, at the same term, and on Saturday, Sept. 7, 1867, the following entry is made:

Appeal to supreme court.

GIBSON MERRITT ET AL. *vs.* MAYOR & ALDERMEN OF NASHVILLE. }

The parties appear, by their attorneys, and the plaintiffs move the court for a new trial of the issues in this cause; which motion, on argument of counsil, is, upon consideration of the court, overuled, to the overrulling of which motion the plaintiffs except, and tender their bill of exception, which they pray *which they pray* may be signed, sealed, and made a part of the record in this cause, which is done, and
16 they also pray an appeal, in the nature of a writ of error, to the next supreme court of errors and appeals to be held in the city of Nashville, on the first Monday in December next, which is granted, bond and security to be given according to law.

Supreme court of Tennessee, at Nashville. December term, 1867.

Present, Judges Sam. Milligan, Horace H. Harrison, and Alvin Hawkins.

GIBSON MERRITT
vs.
MAYOR AND ALDERMEN.

This cause came on for trial on this the 14th day of March, 1868, before the supreme court of Tennessee, sitting at Nashville, upon a transcript of the record from the circuit court of Davidson County, and argument of counsel, when it appeared to the court that there is error in the judgment of the circuit court.

It is therefore considered by the court that the judgment of the circuit court be reversed, annulled, and for nothing held, and that the cause be remanded to the circuit court of Davidson County, with leave to parties to amend their pleadings, and for a new trial.

17 It is further ordered by the court that Gibson Merritt recover of The Mayor and Aldermen, and John Lellyett, security in the appeal bond, the cost of this cause in this court, for which execution will issue.

OFFICE OF THE CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE,
Nashville, March 9, 1868.

I, Jesse G. Frazer, clerk of said court, do hereby that the foregoing is a true, perfect, and complete copy of the judgment of said court, pronounced at its December term, 1867, in the case of Gibson Merritt against Mayor and Aldermen, as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court at office in the capitol at Nashville, on this the 19th day of March, 1868, and the independence of the United States the 92nd year.

[SEAL.] JESSE G. FRAZER, *Clerk.*

Petition to remove cause to U. S. cir. ct..

GIBSON MERRITT ET AL.
vs
THE MAYOR & ALDERMEN OF NASHVILLE.

To the Honorable Eugene Cary, judge of the circuit court of Davidson County:

The defendants in the above cause, come by their attorney, and petition your honorable court that the above cause be removed for
18 trial to the *to the* circuit court of the United States for the middle district of Tennessee, at its term next to be holden in October next; because the said defendants show that all the wrongs and injuries complained of in the said plaintiff's declaration were done and committed, if at all, by officers and persons acting under and by virtue of an order issued by the President or Secretary of War, or by a military officer of the United States, holding command of the department, district, or place within which the said alledged wrongs, trespasses, and injuries were committed; and the said acts were all done during the late rebellion against the authority of the United States.

For more specific statement of facts, defendants say that the persons acting at the time as mayor, aldemen, and councilmen of the city of Nashville were not appointed by defendants, but by the military governor of Tennessee, under and by virtue of an authority confirred upon him by an order issued by the President and Secretary of War, and such acting mayor, aldermen, and council were in no manner under the control of these defendants, and all the acts of such persons or
19 officers were done under the authority of the United States as aforesaid.

And defendants further say that Maj. Gen'l (or at that time Brig. Gen'l, perhaps) James S. Negley had command of the post of Nashville, including the said close mentioned in plaintiffs' declaration; and Captain Saint Clair Morton had, as defendants are informed and believe, at the time, command of Fort Negley and its environs, including said close.

And the defendants further say that the said General Negley and the said Capt. Morton, both being U. S. officers at the time, issued orders commanding that the timber of plaintiff be cut down and removed; and that the same should be done by the persons or officers who actualiy did it; and for the action of a part or all of whom it is sought by this action to hold these defendants responsible.

Defendants therefore pray the removal of the said cause, as before said, for hearing to the circuit court of the United States for the middle district of Tennessee, at its term next to be held, as provided by *by* act of Congress of March 3, 1863, entitled "An act in relation to habeas corpus and regulating judicial proceedings in certain cases;" and
19½ of an act approved May 11, 1866, amendatory thereof.

The affiant makes oath that the matters stated in the above petition, as of knowledge, are true, and those stated upon information he believes to be true.

JOHN LELLYETT,
One of Att'ys for Defendant.

Sworn to and subscribed before me June 13, 1868.

DAVID C. LOVE,
By J. F. HIDE, *D. C.*

Filed June 15, 1868—Hide, D. C.—at 5 minutes to 11 o'clock.

And afterwards, to wit, at the May term, 1868, and on Monday, the 16th day of June, 1868, the following entry is made:

Motion.

GIBSON MERRITT ET AL. }
vs.
MAYOR & ALDERMEN. }

The parties appear by their attorneys, and on the petition of the defendants it is ordered by the court that this cause be transferred to the United States circuit court for the middle district of Tennessee for trial.

STATE OF TENNESSEE:

I, David C. Love, clerk of the circuit court for the county of Davidson, in the State of Tennessee, do certify that the foregoing is *is* a
20 correct transcript of the record and proceedings had in said court in the case heretofore prosicuted and detirmined therein, between

Gibson Merritt et al., plaintiffs, and The Mayor and Aldermen of Nashville, defendants, as the same remain of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office, in Nashville, the 19th day of October, in the year eighteen hundred and sixty-eight, in the 93rd year of American independence.

[SEAL.] DAVID C. LOVE, *Clerk.*

At the October term, 1868, of the circuit court of the United States for the middle district of Tennessee, and on November 6, 1868, the following entry is made on the minutes:

Motion.

GIBSON MERRITT ET AL.
v.
THE MAYOR & ALDERMEN OF NASHVILLE.

In this case the defendants move the court for leave to file new pleas to plaintiffs' declaration in pursuance to the order of the supreme court of Tennessee, rendered at the last term thereof, remanding said cause to the circuit court of Davidson County, Tennessee, "with leave to the parties to amend their pleadings," which motion is continued for
21 consideration to a future day of this term.

And afterwards, to wit, at October term, 1868, and on November 17, 1868, the following entry is made:

Motion & exception.

GIBSON MERRITT ET ALS.
vs.
THE MAYOR & ALDERMEN OF NASHVILLE.

Came the defendants, and moved the court to file seven pleas in lieu of all pleas heretofore filed, when, on argument, and due consideration by the court of the pleas offered in lieu, and the court being of opinion that the first five of the pleas offered now to be filed are, in substance and effect, the same as the pleas heretofore pleaded by the defendants, and that the sixth and seventh pleas now offered to be filed do not, in substance or form, present any ground of defence to the plaintiffs' action, doth order that the motion of defendants to file said seven pleas in lieu of all former pleas by it filed be, and the same is, overrulled and disallowed.

And thereupon the defendants moved the court to allow them to amend the fourth plea, heretofore pleaded, by striking out the words "as to them;" which amendment the court allows to be made, and the same is made. And the court, on application of the plaintiffs, allow
22 them to either demur or reply to said plea.

The said seven pleas so offered to be filed are in the following words:

"1st. And the said defendants come, by their attorney, and defend the wrongs and injury, when, &c., and for plea say that they are not guilty in manner and form as the plaintiffs have in their said declaration alledged against them; and of this they put themselves upon the country.

"2nd. And for further plea to the 3rd count in said plaintiffs' decla-

ration, defendants say that they do not owe in manner and form as the said plaintiffs have in said count alledged against them; and of this they put themselves upon the country.

"3rd. And for further plea to the 4th count in said plaintiffs' declaration, defendants say that they did not undertake or promise in manner and form as the plaintiffs have in said count alledged against them; and of all these defendants put themselves upon the country.

"4th. And for further plea in this behalf, defendants say that all the wrongs and injuries complained of in the said plaintiffs' declaration, and all the acts so done or omitted to be done, of which said plaintiffs complain, were done or committed, or omitted to be done, (if at all,) during
23 the late rebellion against the government of the United States, 'by virtue or under color of an authority derived from or exercised by or under the President of the United States;' and this action was not commenced within two years next after said cause of action (if any there ever was) accrued to said plaintiffs, and not within two years from the 3rd day of March, 1863; which defendants are ready to verify.

"5th. And for further plea in this behalf, defendants say that all the wrongs and injuries complained of in said plaintiffs' declaration, and all the acts so done or omitted to be done, of which said plaintiffs complain, were done or committed, or omitted to be done, (if at all,) during the late rebellion against the government of the United States, 'under and by virtue of an order issued by a military officer of the United States, holding the command of the district, department, or place within which such acts weredone or omitted to be done;' and this action was not commenced withintwo years next after said cause of action
24 accrued to said plaintiffs, and not within two years after the 3rd of March, 1863; which defendants are ready to verify.

"6th. And for further plea in this behalf, defendants say that all the wrongs and injuries complained of in said plaintiffs' declaration, and all the acts so done or omitted to be done, of which said plaintiffs complain, were done or committed, or omitted to be done, (if at all,) during the late rebellion against the government of the United States, under and by virtue of an order issued by the President or Secretary of War, or by a military officer of the United States holding command of the department, district, or place where such acts were so done or omitted to be done; which defendants are ready to verify.

"7th. And for further plea in this behalf, defendants say that forasmuch as the defendants are by law a corporation, consisting of the inhabitants of the city of Nashville, and can only act by certain agencies prescribed by law, chiefly the mayor, aldermen, and councilmen of said city, which these defendants are by law empowered to elect annually, and long before any the wrongs, injuries, or matters of complaint alleged against them were done or committed, the mayor, aldermen, and councilmen of these defendants, elected as aforesaid, were caused to vacate their offices, or resign, or were restrained from exercising the functions of their said offices by virtue of the authority of Andrew Johnson, military governor of Tennessee; and afterwards, and still before the said wrongs, &c., were committed, the terms of services of said officers
25 or agents of these defendants expired by law, and the said military governor appointed other persons to act as aldermen and councilmen to govern said city of Nashville, and reappointed them, and appointed others from time to time until long after all of said matters of complaint had been committed; and these defendants were not permitted to appoint any successors in place of their said lawful agents so removed or vacating their offices; and their said agents, previously

elected, were not permitted to resume the exercise of their functions as mayor, &c., but the before-mentioned appointees of the military governor organized themselves into two boards as aldermen and councilmen, so calling themselves, and elected a person to be mayor other than the person elected by these defendants; and the said so-called mayor, aldermen, and councilmen, by virtue of the military authority of the United States, took possession of the archives and government of said city, to the exclusion of all others, and held the same before, after, and during the time when said wrongs, &c., were (if ever) committed; and all the said acts complained of were committed (if at all) by said military appointees, whom these defendants had not appointed, and could not control or remove, and not by these defendants or any officers, agents, or servants of theirs; and said acts complained of were not done by the consent or approval of these defendants, and have not been ratified by them; and the matters of defense set out in the 4th, 5th, 6th, and 7th please, defendants are ready to verify.

"JOHN LELLYETT,
"*Att'y for Def'ts.*"

26 To which ruling of the court, disallowing the filing of pleas in lieu, the defendants except.

And afterwards, at the April term, 1869, and on Wednesday, May 12, 1869, the following entry is made:

Jury empannelled.

GIBSON MERRITT ET ALS.
vs.
THE MAYOR & ALDERMEN OF NASHVILLE.

The parties appeared, by their attorneys, and thereupon came a jury of good and lawful men, to wit, R. Bruce, J. J. Mankin, W. D. Baker, H. H. Boyers, Charles Robertson, Turner Vaughn, J. D. Thompson, John Thomas, R. H. Stem, John N. Ward, C. B. Hall, and B. R. Cutter, who, being elected, tried, and sworn well and truly to try the issues joined, after hearing a portion of the evidence, were respited until to-morrow morning at 10 o'clock.

And afterwards, on Thursday, May 13, 1869, the following entry is made:

GIBSON MERRITT ET ALS.
vs.
THE MAYOR & ALDERMEN OF NASHVILLE.

The parties again appear, by their attorneys, and came also the same jury empannelled in this cause on yesterday, who, after hearing a portion of the evidence, were respited until to-morrow morning at
27 ten o'clock.

And afterwars, on Friday, May 14, 1859, the following entry is made:

Jury hear argument.

GIBSON MERRITT ET ALS.
vs.
THE MAYOR & ALDERMEN OF NASHVILLE.

Came again the parties, by their attorneys, and came also the same

jury heretofore empannelled in this cause, who, after hearing the conclusion of the evidence and a portion of the argument of counsel, were respited until to-morrow morning at 10 o'clock.

And afterwards, to wit, on Saturday, May 15, 1869, the following entry is made:

Charged.

GIBSON MERRITT ET ALS.
v.
THE MAYOR & ALDERMEN OF NASHVILLE.

Came again the parties, by their attorneys, and came also the same jury heretofore empannelled in this cause, who, after hearing the conclusion of the argument of counsel and the charge of the court, were respited Monday morning next at 10 o'clock.

And afterwards, on Monday, May 17th, 1869, the following entry is made:

Respited again.

GIBSON MERRITT ET ALS.
vs.
THE MAYOR & ALDERMEN OF NASHVILLE.

Came again the parties, by their attorneys, and came also the
28 same jury heretofore empannelled in this cause, who, not having agreed on a verdict, were respited until to-morrow morning at 10 o'clock.

And afterwards, on Tuesday, May 18, 1869, the following entry is made:

Judgment.

GIBSON MERRITT ET ALS.
vs.
THE MAYOR & ALDERMEN OF NASHVILLE.

Came again the parties, by their attorneys, and came also the same jury heretofore empannelled in this cause, who, upon their oaths, do say that they find the issues in favor of the plaintiffs, and assess their damages at the sum of four thousand dollars.

And afterwards, to wit, on Wednesday, May 19, 1869, the following entry is made:

GIBSON MERRITT ET ALS.
vs.
THE MAYOR & ALDERMEN OF NASHVILLE.

The parties again appear, by their attorneys, and the defendant, by its attorney, moved the court in arrest of judgment, for the following reasons:

1st. For the joinder of counts in trespass, quare claussum, trover, debt, and assumsit in the same action.

2nd. For want of issue to the *want of issue to the* fourth plea of defendants.

Which motion was by the court overruled.

It is therefore considered by the court that the plaintiffs recover of the defendants the damages aforesaid by the jury aforesaid assessed, and also the cost by them about their suit in this behalf expended, and that fi. fa. issue of the same.

Motion for new trial.

Whereupon the defendant, by its attorney, moved the court for a new trial; which motion the court takes under advisement.

On Thursday, May 20th, 1869, the following entry is made:

GIBSON MERRITT ET ALS.
v.
THE MAYOR & ALDERMEN OF NASHVILLE.

In this cause the defendants, by their attorneys, expressly waive before the court all exceptions to the entering of judgment on the verdict of the jury rendered in this cause at the present term of the court, because of the failure of the jury in said verdict to indicate upon which count or counts in the declaration said verdict is found, but the court may assign said verdict to any count in said declaration on which, in the opinion of the court, such verdict could be found upon the evidence in the cause; and this particular error, if error there be, is released, and none other.

JOHN LELYETT,
BRADLEY & PEABODY,
Attorneys for Def'ts.

And afterwards, at said April term, 1869, and on May 21, 1869, the last day of said term, the following entry is made:

GIBSON MERRITT ET ALS.
vs.
THE MAYOR & ALDERMEN OF NASHVILLE.

In this cause the motion for a new trial, heretofore entered by the defendants, is continued until the next term.

Bill of exception.

In the circuit court of the U. S., mid. dist. of Tenn., April term, 1869.

Defendents' bill of exceptions.

GIBSON MERRITT ET ALS.
vs.
THE MAYOR & ALDERMEN OF NASHVILLE.

On the calling of this cause for trial the defendants' attorneys moved the court for leave to amend his plea of the statute of limitation, pleading in lieu thereof two pleas, being the same offered and refused at the last term of the court, and which two pleas are in the following words:

"And for further plea in this behalf, defendants say that all the wrongs and injuries complained of in the said plaintiffs' declaration, and all the acts so done, or omitted to be done, of which said plaintiffs

complain, were done, or committed, or omitted to be done (if at
31 all) during the late rebellion against the government of the United States, 'by virtue or under color of an authority derived from or exercised by or under the President of the United States;' and this action was not commenced within two years next after said cause of action (if any there ever was) accrued to said plaintiffs, and not within two years from the 3rd of March, 1863; which defendants are ready to verify.

"And for further plea in this behalf, defendants say that all the wrongs and injuries complained of in said plaintiffs' declaration, and all the acts so done, or omitted to be done, of which said plaintiffs complain, were done, or committed, or omitted to be done (if at all) during the late rebellion against the United States, 'under and by virtue of an order issued by a military officer of the United States, holding the command of the department, district, or place within which said acts were done or omitted to be done; and this action was not commenced within two years next after said cause of action accrued to said plaintiffs, and not within two years after the 3rd March, 1863; which defendants are ready to verify."

And the court overruled said motion to amend as aforesaid; to which ruling of the court defendants' attorney excepted.

32 Defendants' attorney next asked the court to dispose of a demurrer found among the papers in said cause, entitled of said cause, and signed by the plaintiffs' attorney, and on which defendants attorney had joined in demurrer, and which is as follows:

"*Demurrer.*

"GIBSON MERRITT ET ALS.
vs.
"THE MAYOR & ALDERMEN OF NASHVILLE.

"Demurrer of plaintiffs to fourth plea of defendents:

"The plaintiffs, not confessing or admitting any of the matters set forth in said fourth plea to be true, but protesting, &c., doth demur to said fourth plea, and for cause of demurrer doth say—

"That said plea, in substance and form, is wholly insufficient in law to bar the plaintiffs' cause of action, or either one of them, as set forth in said declaration.

"That the said plea does not show, by any sufficient averment therein contained, that the plaintiffs' causes of action, or either one of them, set forth in their declaration, are embraced by the provisions of either one of the acts of Congress mention in said plea; and that said acts do not, by any statute of limitation therein provided, apply to any cause of action set forth in the plaintiffs' declaration.

"Wherefore, for these and other causes of demurrer to be urged in argument, the plaintiffs doth demur to the said fourth plea of defendants, and pray the judgment of the court whether they shall make any other or further reply to said plea, &c.

33 "REID & STOKES,
"*Atto's for Plaintiffs.*

"Defendants join in demurrer.

"LELLYETT, *Attorney.*"

Plaintiffs' attorney objected that said demurrer was not marked "Filed" by the clerk, and on referance to the minutes of the court there was no entry found of the filing of said demurrer.

And plaintiffs' attorneys insisted on going to trial on the basis of an agreement made between the attorneys of the parties at the September term of the circuit court of Davidson County, 1867; which is in the following words:

"And as to the fourth and last plea of the defendants the plaintiffs filed a demurrer, upon several grounds, when, upon agreement of the parties, the plaintiffs are allowed upon the trial of the cause and argument before the court to rely upon the grounds of objection set forth in the demurrer to said plea; and thereupon the plaintiffs withdraw their demurrer, and join issue to said plea upon the footing of said agreement.

"REID & STOKES,
"*Attorneys for Pl'ffs.*
"JOHN LELLYETT,
"*Attorney for Def'ts.*"

And thereupon defendants' attorney objected to be further bound by said agreement, since said plea had been amended, and plaintiffs had obtained leave to take issue on, or demur to, said plea. And the
34 court overruled the objection of defendants' attorney, and directed that the cause proceed to trial upon the basis of said agreement, to which ruling of the court the defendants excepted.

And then defendants' attorney moved the court for a rule on the plaintiffs to take issue or demur to said fourth plea; which motion the court overruled and the defendents excepted

And thereupon the defendants moved the court for judgment on said plea for want of issue thereon, or demurrer thereto; which motion the court overruled, and defendents excepted.

And thereupon defendants moved the court for dismissal of plaintiffs' declaration for the misjointed of trespass, quare claussum, and debt and assumpsit in others; which motion was overruled by the court. and defendants excepted.

And thereupon defendants moved the court for a rule on plaintiffs to elect whether to proceed in trespass or in debt and assumpsit; which motion the court overruled, and defendants excepted.

And thereupon the parties proceeded to the trial of said cause, and the plaintiffs introduced the following testimony:

Plaintiffs read the following papers to prove their title to said tract of land described in the declaration:

35 "*Order of county court appointing commissioners to divide lands of Jno. Rains, dec'd, and decree thereon.*

"State of Tennessee, Davidson County court, October session, 1834.

"This day, to wit, November 5, 1834, Ephraim H. Foster, esquire, presented in court the petition of John Rains; Michael C. Dunn, and Elizabeth, his wife, formerly Elizabeth Rains; Thomas Massey, and Mary, his wife, late Mary Rains; David Boyd, and his wife Nancy, formerly Nancy Rains; Gibson Merritt, and Sarah, his wife, late Sarah Rains; Timothy Demumbrane, and his wife Christiana, late Christiana Rains; Burrell Quimby, and his wife Susannah, late Susannah Rains; and Jonathan H. Rains; also, Alfred P. Gowen, in right of his mother, Patsey Gowen, late Patsey Rains; also, Wilford Rains; Harne Rains; Lewis Williams,

and Charlotte, his wife, late Charlotte Rains; Wilford B. Gowen, and his wife Usula, late Usula Rains; Edmond Hyde, and his wife Christiana, formerly Christiana Rains; Mary E. H. Rains and Martha Rains, in right of their father, William Rains, deceased; also, James Condon, Mary Condon, Christiana Condon, and Francis Condon, minors, by their guardian, James Condon, in right of their mother, Barbara Condon, formerly Barbara Rains; all heirs of John Rains, deceased, late of this county, representing to the court that the said John Rains died seized and possessed of a tract of land containing about six hundred and
36 acres, more or less, situated in said county, near the town of Nashville, and also a lot, number one hundred and five, in the town of Nashville, which are particularly described in said petition, which has descended to them as heirs aforesaid, and which they are entitled to have divided and partitioned among them in the proportion particularly mentioned and set forth in said petition; and praying the court to appoint commissioners to make said partition and division between them in the manner and proportion stated and set forth in said petition, which partition the court—(words omitted in copy)—and thereupon appoint Robert Weakley, David Dickinson, Richard A. Barry, James H. Foster, James Thompson, William Compton, Philip Shute, John P. Hickman, and Robert Scales, them or any five of them who may be present and act, commissioners to divide and partition said tract of land and said lot between said partitioners upon the terms and in the manner and proportion set forth in said petition, and having so done make report thereof under their hands and seals to the ensuing term of our court.

"Teste: "HENRY EWING,
"*Clerk of Davidson County Court,*
"By JOHN H. EWING,
"*His Deputy.*

"*Report of commissioners.*

"Agreeable to an order from the worshipful county court of Davidson County, Oct. term, 1834, directed to us as commissioners, to law off and
37 apportion and divide the tract of land whereon John Rains, between the several legetees of said deceased, we, the undersigned commissioners for the joint interest of all the legatees, have divided said tract of land in two divisions, with a lane running from the north boundary to the south boundary of said tract, three poles and a half wide: Beginning on the north boundary line, on the west side of the big road leading from Nashville to the fishing ford on Duck River, at the distance of one hundred and seventy-six poles from the northwest corner of said tract, and running south 35 degrees east twelve poles to a stake; two hundred and seventy poles to a stake in the south boundary line of said tract; thence east with said line ninety poles to a stake on the south bank of Brown's Creek; thence north two poles to a stake; thence west eighty-six½ poles to a stake in the avenue; thence north two hundred and eighteen poles to a stake; thence north 35 degrees west 12 poles to a stake in the north boundary line of said tract; thence west to the beginning; it being laid off as a joint passway for all the subdivisions.

"*Sally Merritt.*

"The beginning of it 1st sub-division was drawn by Sally Merritt, is on the northwest corner of said tract, running east one hundred and seventy-six poles to a stake, the beginning of the avenue; thence south 35 degrees east twelve poles to a stake in the avenue; thence

38 south 28 poles to to a stake near the dwelling-house of said deceased; thence west 183 poles to a stake in the west boundary line; thence north 38 poles to the beginning; containing 43 acres and 39 poles.

"*Eliz. Dunn.*

"The beginning lot No. 2, drawn by Elizabeth Dunn, is on a stake, the southeast corner of lot No. 1, and running west with said line 188 poles to a stake; thence south 38 poles to a stake; thence east 183 poles to a stake in the avenue; thence north to the beginning; containing forty-three acres and 73 poles.

"*Nancy Boyd.*

"The beginning of lot No. 3, that was drawn by Nancy Boyd, is on the southeast corner of lot No. 2, and running west with said line 183 poles to a stake in the west boundary line of said tract; thence south 42 poles to a stake in said line; thence east 183 poles to a stake in the avenue; thence north to the beginning; containing 43 acres & 6 poles.

"The beginning of lot No. 4, that was drawn by A. P. Gowen, is on the southeast corner of lot No. 3, and running west with said line 183 poles to a stake in the west boundary line; thence south 44 poles to a stake; thence east 183 poles to a stake in the avenue; thence north to the beginning; containing fifty acres & fifty-two poles.

"The beginning of lot No. 5, that was drawn by the heirs of William Rains, is on the southeast corner of lot No. 4, and runs west 183 poles to a stake in the west boundary line of said tract; thence south
39 37 poles to the southwest corner of said tract; thence east 146 poles to a stake-pointer, two on cup oaks and a dogwood; thence south 30 poles to a black oak; thence east 37 poles to the avenue north to the beginning; containing forty-nine acres and 132 poles.

"The beginning of lot No. 6, drawn by J. H. Rains, is on a stake in the north boundary line of said tract 179½ poles from the N. W. corner of said tract, on the east side of the road leading from Nashville to the fishing ford of Duck River, and runs south 35 degrees east 12 poles to a stake in the avenue; thence south 27 poles $\frac{128}{100}$ to a stake in the avenue; thence east 12½ poles to a stake near the spring; thence south $\frac{72}{100}$ of a pole to a stake; thence east 255 poles to a stake in the east boundary line of said tract; thence west 276 poles to the beginning; containing 64 acres and 84 poles.

"The beginning of lot No. 7, drawn by John Rains, is on the southeast corner of lot No. 6, and runs west with said line 255 poles to a stake near the spring; thence north $\frac{72}{100}$ poles to a stake in the avenue; thence east 272 poles to a stake in the east boundary line of said tract; thence north to the beginning, containing 64 acres & 105 poles.

"The beginning of lot No. 8, that was drawn by C. Demumbrane, begins in the southeast corner of lot No. 7, and runs west 272 poles
40 with said line to a stake in the avenue; thence south 38 poles to a stake in the avenue; thence east 273 poles to a stake in the east boundary line of the said tract; thence north to the beginning; containing 64 acres & 134 poles.

"The beginning of lot No. 9, that was drawn by the heirs of Barbara Condon, begins on the southeast corner of lot No. 8, runs thence 273 poles to a stake in the avenue; thence south 43 poles to a stake in the avenue; thence east 274 poles to the east boundary line of said tract; thence north to the beginning; containing 73 acres 102 poles.

"The beginning of lot No. 10, drawn by Polly Massey, begins on the

southeast corner of lot No. 9, and runs thence 274 poles to a stake in the avenue; thence south 44 poles to a stake; thence east 275 poles to a stake in the east boundary line of said tract; thence north to the beginning; containing 75 acres & 100 poles.

"The beginning of lot No. 11, that was drawn by Susan Quimby, begins on the southeast corner of lot No. 10, and runs west 275 poles to a stake in the avenue; thence south 27 poles to a stake, the corner of the avenue; thence east 86½ poles to a stake on the south bank of Brown's Creek; thence south two poles to the south boundary line of said tract; thence east 79½ poles to the corner of said tract; thence south 85 degrees east 93 poles; thence north to the beginning; containing 78 acres & 4 poles.

41 "We have also proceeded to divide lot No. 105 in the city of Nashville, agreeable to the plat hereunto annexed and laid off:

"To Jonathan H. Rains lot No. 1, beginning at the corner of High and Broad streets, running thence northward with the line of said High street 156 feet to the line of a 12 feet one inch ally; thence at right angles northeastward with the line of said ally 21 feet; thence southeastwards with the line of lot No. 2 to Broad street; thence with the line of Broad street 21 feet to the beginning.

"To Mary Boyd lot No. 2, beginning at the corner of lot No. 1 on Broad street; thence running with the line of said lot No. 1 northwestwards 156 feet to the line of said ally; thence northeastwards with the line of the ally 21 feet to the corner of the lot No. 3; thence southeastwards with the line of lot No. 3 to Broad street; thence with the line of Broad street to the beginning.

"To Sally Merritt lot No. 3, beginning at the corner of lot No. 2 on Broad street; thence running with the line of said lot No. 2 northwestwards 156 feet to the said ally; thence northeastwards with said ally 21 feet to the corner of lot No. 4; thence southeastwards with the line of lot No. 4 to Broad street; thence with the line of Broad street to the beginning.

"To Susan Quimby lot No. 4, beginning on the corner of lot No. 3 on Broad street; thence running with the line of No. 3 northwestwards 156 feet to the line of said ally 21 feet to the corner of lot No. 5;

42 thence southeastwards with the line of lot No. 5 to Broad street 21 feet to the beginning.

"To John Rains lot No. 5, beginning at the corner of lot No. 4 on Broad street; thence running with the line of No 4 northwestwards 156 feet to the line of said ally; thence northeastwards with the line of said ally 21 feet to the corner of lot No. 6 to Broad street; thence with the line of Broad street 21 feet to the beginning.

"To the heirs of William Rains lot No. 6, beginning at the corner of lot No. 5 on Broad street; thence running with the line of No. 5 156 feet to the line of the ally; thence northeastwardly with the line of said ally referred to 21 feet to the corner of lot No. 7; thence southeastwards with the line of lot No. 7 to Broad street; thence with the line of Broad street 21 feet to the beginning.

"To Christianna Demumbrane lot No. 7, beginning at the corner of lot No. 6 on Broad street; thence running with the line of No. 6 156 feet to the line of said ally; thence northeastwardly with the line of said ally 21 feet to the corner of lot No. 8; thence southeastward passing the corner of lot No. 8 at 12 feet, and with the line of No. 8 to Broad street; thence with the line of Broad street 21 feet to the beginning.

"To Elizabeth Dunn lot No. 8, beginning at the corner of lot No. 7 on Broad street; thence running with the line of No. 7 northwestwards

144 feet; thence northeastwards at right angles 21 feet; thence
43 southeastwards at right angles and parallel with the first line to Broad street; thence with the line of Broad street 21 feet to the beginning.

"To Polly Massey lot No 9, beginning in the line of High street, where northwestwards to the line of the 12 feet 1 inch ally intersects the same; thence running northeastwards with the line of said ally 146 feet; thence running northwestwards parallel to High street 30 feet to the corner of lot No. 10; thence with the line of No. 10 southwestward 146 feet to High street; thence with the line of High street to the beginning.

"To Alfred P. Gowen lot No. 10, beginning on the line of High street at the corner of lot No. 9; thence running northeastwards with the line of No. 9 and passing the corner 158 feet; thence running northwestwardly parallel to High street 30 feet to the line of lot No. 11; thence running southwestwardly with the line of No. 11 158 feet to High street; thence with the line of High street to the beginning.

"To Barbara Condon lot No. 11, beginning in the line of High street at the corner of lot No. 10; thence running with the line of No. 10 northeastwardly, passing the corner 180 feet 10¼ inches; thence northwestwardly parallel with High st. 30 feet to the original line of said lot No. 105; thence southwestward to the line of High street; thence with the line of same 30 feet to the beginning; all of which, togather with
44 two plats, one of the division of the land and the other of the lot, both of said plats constituting a part of this report, are respectfully submitted.

"JAMES H. FOSTER. [SEAL.]
"DAVID DICKENSON. [SEAL.]
"R. H. BARRY. [SEAL.]
"PHILIP SHUTE. [SEAL.]
"JAMES THOMPSON, [SEAL.]
D. Surveyor.

"*Decree.*

"State of Tennessee, Davidson County court, January session, 1835.

"This day James H. Foster, David Dickinson, R. H. Barry, Philip Shute, and James Thompson, five commissioners appointed by an order of the proceeding court to divide, partition, and distribute the real and personal estate of John Rains, sr., deceased, among and between his heirs and distributees according to law, now make report, under their hands and seals, of having made a partition and division of said real estate among and between the heirs-at-law of the said John Rains, deceased, in pursuance of said order; which being seen and inspected by the court, is in all things confirmed and ordered to be entered of record. And it is further ordered, adjudged, and decreed by the court here that the said heirs mentioned in the petition and proceeding in this cause respectively have and hold the several parts and portions of said real estate allotted and assigned to them in the report aforesaid, in
45 severalty and in fee. And it is further ordered that the said heirs pay the cost of this proceeding in equal proportion, and that execution issue, &c.

"Test: HENRY EWING,
"*Clerk of said Court.*

"*Certificate.*

"STATE OF TENNESSEE, *Davidson County:*

"I, P. L. Nichol, clerk of the county court of said county, do certify that the within is a full, true, and perfect copy of the order of said court appointing commissioners to divide the lands of John Rains, dec'd, among his heirs, and of the report of said commissioners and decree thereon, as the same appears on record in my office.

"Witness my hand and seal of said court at office in Nashville, this 3rd day of May, 1869.

[SEAL.]

"P. L. NICHOL, *Clerk*,
"By C. H. EASTMAN, *D. C.*

"*Mortgage.*

"Registered Sept. 14, 1855.

"This indenture, made and entered into on the 13th day of September, 1855, between Gibson Merritt and his wife, Sally Merritt, of Davidson County, Tennessee, of the one part, and the Nashville Building Association, of the other part, witnesseth that the said Gibson and Sally Merritt, for and in consideration of the sum of five dollars to them in hand paid, and the other considerations hereinafter mentioned,
46 hath given, granted, bargained, and sold, and by these presents doth give, grant, bargain, sell, alien, convey, and confirm, unto the said Nashville Building Association forever, a certain tract, piece, parcel, or lot of ground lying in Davidson County, Tennessee, adjoining the city of Nashville, bounded on the north by the corporation line of said city; on the east by the Nolensville turnpike and Rains' avenue; on the south by the lands of James M. Hamilton, and on the west by the Tennessee & Alabama railroad; containing 45 acres, and being the tract owned by said Gibson and Sally Merritt, and on which they now reside. This land is conveyed as a substitute for a certain tract conveyed by said Gibson & Sally, by deed registered in the register's office of Davidson County, book No. 20, page 48, to said association, which is by said association released at the request of said Gibson & Sally Merritt:

"To have and to hold the same, togather with all the improvements, hereditiments, and appurtainances thereto belonging, to the said Nashville Building Association forever.

"And the said Gibson & Sally Merritt, for themselves, their heirs, executors, and administrators, doth covenant and agree with the said Nashville Building Association that the title to the said property
47 they will forever defend against the lawful claims of all persons whatever.

"The condition of the above deed is such that whereas the said Gibson & Sally Merritt, on the 2nd July, 1855, executed their bond by which they are firmly bound unto the Nashville Building Association in the sum of four thousand dollars, conditioned for the payment of the just sum of two thousand dollars in the manner following; that is to say, $20 on or before the last day of each month succeeding the date of said bond, (or the day previous, if the last should be Sunday,) until the whole sum of $2,000, and the interest, payable monthly, shall be paid and satisfied.

"Now, if the said Gibson and Sally Merritt shall well and truly pay, or cause to be paid, to the Nashville Building Association the said sums of money as they shall be due according to the tenor and effect of said

bond, then this deed shall be void; but if they shall fail to pay the same for three months, then the said Nashville Building Association, by its treasurer, after giving ten days' notice in a newspaper published in Nashville, shall proceed to sell said property at auction for cash, and apply the proceeds as follows: 1st. To the payment of the necessary expences of this trust; 2rd. To the payment of said debt, togather
48 with all other payments, moneys, and expences due the association, and the balance, if any there be, to the said Gibson and Sally Merritt.

"And the said Gibson & Sally Merritt hereby releases, for themselves, their heirs, and representative, all rights to redeem said property in the event of a sale. It is also understood that the said Gibson and Sally Merritt is to retain possession of said property until default of payment aforesaid.

"In testimony whereof the said Gibson Merritt and Sally Merritt hereunto set their hands and seals at Nashville, Tennessee, the day and year first above written.

"GIBSON MERRITT. [SEAL.]
"SALLY MERRITT. [SEAL.]

"STATE OF TENNESSEE, *Davidson County:*

"Personally appeared before me, F. R. Cheatham, clerk of the county court of said county, the within-named Gibson Merritt and Sally Merritt, the bargainors, with whom I am personally acquainted, and acknowledged the within deed to be their act and deed for the purposes therein contained.

"And the said Sally Merritt, femm covert, having also personally appeared before me privately and apart from her husband, acknowledged the execution of said deed to have been done by her freely, voluntarily, and understandingly, without any compulsion or restraint from
49 her said husband, and for the purposes therein expressed.

"Witness my hand at office this 14th day of September, 1855.

"F. R. CHEATHAM.

"Received September 14, 1855, at 10 a. m.

"I certify the foregoitg to be a true copy from book 20, page 63, of my office.

"CHARLES W. SMITH,
"*County Register.*"

[5-cent int. rev. stamp cancelled.]

Testimony of C. W. Nance.

Plaintiffs introduced C. W. NANCE, who testified as follows:

Witness knows the tract of land described in the declaration, and has known the same for forty years. Witness has been a surveyor and surveyed the tract in question. The description given in the declaration was read to witness, who stated that the said description was correct. Witness knew Gibson Merritt, and, in her lifetime, his wife, Mrs. Sally Merritt. The latter died in the year 1861. Witness knew when the said land was divided, and the tract in question was allotted to Sally Merritt. She and her husband, Gibson Merritt, went into the possession of said land about the year 1840, and remained in possession, holding said land adversly as to all other persons, as the property of said Sallie Merritt to her death. Sallie Merritt was the daughter of John

Rains, and had but two children, namely, A. G. Merritt, and a daughter C. H., who is now the wife of Frank Hagan. Witness knew the
50 grove in question, which occupied about 20 acres of said land. It was well timbered. Witness is not well versed in estimating wood standing on land, but supposes there was in the western half of said grove about 60 cords per acre, and on the eastern half about 40 cords per acre. The part of said grove nearest to Fort Negley was about 400 yards therefrom. A revine passed through said land, and at one point in said ravine a man standing erect could not see the top of Fort Negley. The grove in question was just outside the corporate limits of Nashville.

Testimony of A. G. Merritt.

Plaintiffs examined A. G. MERRITT:

Witness is one of the plaintiffs. Is the only son of Mrs. Sallie Merritt, who died in 1861. Her only other heir is C. H., the sister of witness, and wife of Frank Hagen. Gibson & Sallie Merritt occupied and held in possession said lands from at least as far back as 1840 to the death of said Sallie Merritt, holding said lands adversly as to all strangers as the property of the said Sallie & Gibson Merritt. The mortgage on said lands to the said Nashville Building Association were paid off and discharged before the war. Gibson Merritt (one of the plaintiffs) filed a claim against the government for the cutting of the wood in question from the land. When witness returned home in 1865 he was satis-
51 fied that said claim against *against* the government was erroneous. Witness has understood that something has been allowed on said claim; but it has not been demanded; nor has it been withdrawn, or any action taken in the matter by plaintiffs to collect said claim of the government, and the plaintiffs do not now claim anything from the government for the wood, as they have become satisfied that The Mayor & Aldermen of Nashville got the wood, and not the government. Witness was informed that said claim of Gibson Merritt, with other claims presented to the Driver Board, had been sent away from Nashville, and Gibson Merritt has been unable to get said claim back. In 1865, while John Hugh Smith still continued mayor, he mentioned to witness the suit his father had commenced against defendants, and asked witness to confer with him, with a view to a settlement. Witness went to see said Smith on the subject, but could not effect a settlement because of differance of opinion as to the amount of wood and price.

G. W. Southgate's evidence.

Plaintiffs introduced G. W. SOUTHGATE:

Witness is a surveyor, and surveyed the tract of land described in the declaration in 1866. Witness had made a plat of said land, and found that the amount of woods which had then recently been cut off
52 was 21 acres. On cross-examination witness said he had at a later date made a survey and plat of said land, and made the amount of woodland 20 acres & 39 poles.

James Lester.

Plaintiffs offered in evidence the deposition of James Lester, contained in the transcript of a record of the circuit court of Davidson County, certified by the clerk of said court as containing "a correct copy of the depositions and other proof used on the trial of the above-entitled cause

as the same remains of record" in the office of said clerk. And the defendants' attorney objected to the reading of said deposition: 1st, because there is no sufficient ground shown why the witness should not be introduced in person; and 2nd, because it is only a copy certified by the clerk of the circuit court of Davidson County. But the court overruled defendants' objection, and permitted the deposition to be read; to which ruling of the court defendants excepted.

The said deposition was here read to the jury, as follows:

Deposition of James Lester.

The deposition of JAMES LESTER, as follows:

Question 1. State your age and occupation, and in what part of the county you were raised and have resided.

Ans. I am thirty-six years old; I am a brick-mason; I was raised in South Nashville, and in some 400 yards of the plaintiffs' place; I was living in 1860 and up to 1865 on the corner of Cherry & Mallory streets. Some eight years ago I had a brick-yard adjoining the Merritt
53 place.

Ques. 2. State all you know of the cutting of the wood off of the Merritt place.

Ans. I was on the place about two days after the hands, who were under the control of J. L. Stewart, had commenced cutting. I went there for the purpose of buying some of the wood. Jesse Perry and a man by the name of Griffith were with me. We all went for the same purpose. Mr. Stewart told us that there was no instructions to sell it, and that he was employed by the corporation to cut and cord the wood.

Ques. 3. State what were your opportunities for knowing the Merritt woods.

Ans. I have known the place for some twenty years, and have passed through it very often during that time, and for two years lived on a place that was seperated from it by the Tennessee & Alabama railroad only.

Ques. 4. How many cords of wood do you estimate as being on the Merritt place?

Ans. I think it would turn out from 45 to 60 cords per acre.

Question 5. Had much of the timber been removed at the time that you & Perry & Griffith went there? And was it or not in the same condition as you had always known it?

Ans. I do not think that any, or but little of it, had been taken off of the place at that time, and it was in the same condition in which I had always known it.

54 Question 6. State if you have ever had occation to make estimate of timber standing on land.

Ans. When I was engaged in making brick, during the period of about three years, I was in the habit of buying the wood that we burned standing on land, and in that way I became familiar with estimating the amount of timber that was on land.

Ques. 7. Was wood at that time high or low, and what was it selling for by the cord?

Ans. It is high; and sold at from $10 to 12$ in the city.

Ques. 8. How near is the Merritt place to the city?

Ans. It is on the edge of the city.

(Defendants' council objected to anything witness heard Mr. Stewart say about his agency for the corporation.)

Ques. 9. When you speak of wood being at that time worth from 10$ to 12$ per cord, do you mean wood in the forest, or cut and delivered?

Ans. I mean wood cut and delivered in the city.

Ques. 10. Could farmers and others haul wood to the city at that time? Would not their wagons, harness, and drivers have been pressed to work on the fortifications?

Ans. I do not know. I never saw them press any country wagons.

Certificate.

STATE OF TENNESSEE:

I, David C. Love, clerk of the circuit court for the county of Davidson, in the State aforesaid, do certify that the foregoing is a correct
55 copy of the deposition and other proof used on the trial of the above-entitled cause, as the same remains of record in my office.

In testimony whereof I hereunto subscribe my name and the office seal of said court at office in Nashville the 3rd day of May, 1869, and in the 93 year of American independence.

[SEAL.]

DAVID C. LOVE, *Clerk*,
By J. F. HYDE, *D. C.*

Plaintiffs then introduced the books of the corporation of Nashville, and proved the same to be the books in which the recorder of said city keeps the minutes of the proceedings of the two boards of the city council, and from them read the following extracts of proceedings:

Message of John Hugh Smith, mayor. On page 145, Octo. 21, 1862, aldermen record. On page 68, Oct. 21, 1862, on common councils record:

"*Message of mayor.*

"I have but one subject to call your particular attention to at the present time, which is the high price of wood, and the inability of citizens, especially those belonging to the laboring or poorer classes, from the want of employment, to procure it. Although winter has not yet commenced, yet, if something is not speedily done by your honorable body, there will be great suffering in this city. I have taken preliminary steps upon this subject, anticipating your approbation. I
56 have sent an agent in the direction of the Northwestern railroad, to ascertain at what price wood can be purchased and delivered on the cars of said road. He has not returned, and I can therefore make no report on that subject. The military, as far as the railroads are concerned, have assured me of every facility in their power. I respectfully recommend, on this subject, your immediate action, by the appointment of a committee clothed with ample authority to contract, &c. Nothing more at present.

"Your ob't serv't,

"JNO. HUGH SMITH, *Mayor.*

Also, on page 147, of record of board of aldermen; and on page 69, of record of board of common council, Octo. 21, 1862, appear the following resolutions offered by Mr. Mulloy, and their adoption:

"*Resolutions.*

"Mr. Mulloy offered the following resolutions:

"1st. *Resolved*, That we heartily approve of the efforts of Mayor Smith

in making the necessary arrangements by which our city will be supplied with a sufficient quantity of wood for the coming winter, and at such prices that will be in the reach of all.

"2nd. *Resolved*, That a committee, consisting of the mayor and the presidints of the two boards, be appointed, who shall have all necessary power to carry out the above object.

"*Adopted.*

"On motion the resolutions were adopted."

57 And on page 168 of minutes of board of aldermen appears the following resolution, Jan. 6, 1863:

"*Resolution.*

"Aldermen Scovel submitted the following resolution:

"*Resolved*, That the agent of the wood department, Mr. Ja's G. Smith, report in detail the business as transacted by him to the next meeting of the board.

"*Adopted.*

"On motion, the resolution was adopted."

And on page 95 of the minutes of common council appears the following, to wit, Febr'y 12, 1863:

"The recorder read a report of Ja's G. Smith, agent of the wood department. Received and filed."

Deposition of Jno. Hugh Smith.

Plaintiffs then, by consent of defendants' attorney, read the deposition of JOHN HUGH SMITH, which is in words following:

Were you the mayor of Nashville in 1862 & 1863? If so, did the corporation of Nashville, in its corporate capacity, cut down and remove from the lands owned by the plaintiffs any wood, or was said wood removed by individuals in their individual capacity? Did not the corporation of Nashville cut down and remove the wood of others, F. R. Rains, and afterwards pay him for it, and did not you, as mayor, offer to pay A. G. Merritt for the wood, which he refused to accept, unless in part payment only; if so, how much did you offer?

58 Ans. I was the mayor of Nashville in 1862 & 1863. Some time in the early part of the winter of 1862 & 1863 I had information from Capt. St. Clair Morton, who was the chief engineer of the Army of the Cumberland, and at that time constructing Fort Negley, that all the wood in the immediate vicinity of the fort would be felled by him to prevent a cover for an attacking party. The wood of the plaintiffs was, perhaps, the nearest to the fort. I procured an order, which was afterwards reduced to writing, from Gen'l Negley, then in command of the military post, to take some of the wood that was to be felled, as the corporation might need for the use of the poor of the city, and also for the water works. I sent Mr. Ja's C. Smith to Capt. Morton to ascertain what wood the corporation could take, and I appointed him afterwards to superintend the cutting and hauling the wood to the city and water works, and John L. Stewart, the street overseer, assisted him, and was on the ground and measured and kept an account of the cutting and

hauling. The hands who cut the wood taken by the corporation were employed by Smith & Stewart, and paid for out of the corporation treasury. The corporation did cut a portion of the wood of F. R. Rains in the same vicinity, and shortly after paid him without any difficulty. In 1865 the finance committee and myself, as mayor, offered to pay A. G. Merritt for the wood taken by the city, but the matter was not
59 settled on account of the difficulty as the quantity and price.

Ques. State whether or not the hands who were employed to cut and haul wood were employed under authority of the resolution appointing the mayor and the presidents of the two boards a committee to procure wood.

Ans. As mayor and chairman of the wood committee I appointed Ja's G. Smith to employ hands, &c.; and also, as mayor, I directed John L. Stewart, deceased, who was the street overseer, to assist him.

Cross-examination:

Defendants' attorney objects to so much of the first question and answer as asks or gives any opinion in law as to whether the acts referred to were the acts of the mayor & aldermen in their corporate capacity, or of officers or persons acting under military orders, or of persons acting without the authority or any authority other than the corporation. What we wish is simply the facts.

Question 1. By whom and under what authority were you appointed mayor in 1862, and did you continue to hold your place as mayor under the same authority in 1863, during all the time alluded to in your deposition?

Ques. 2. By and under what authority did the board of aldermen and common council, acting with you during the same time, hold their places? Did the then existing board of aldermen and common
60 council and mayor have any authority during said time other than that derived from the military authorities of the United States?

Quest. 3. Was the city of Nashville during the whole or part of said time in a state of partial siege, and was it not a military post?

Question 4. Was not the said post, embracing all within the corporation limits, filed with refugees, some of whom were destitute, as well as the poor of the city, and was not these poor and refugees depending upon the military bounty for food and fuel?

Question 5. Was not the timber on the land in question cut and distributed in part among the poor and refugees at the instance of the military commanders, and as a military bounty, the necessity thereof resulting from the military occupancy and situation?

Ques. 6. Was not the city water works run in large part for the supply and service of the United States Army, and did not the government Q. M. Dep't supply fuel therefore during the whole or part of the time in question, and was not the wood from Merritt's land so supplied, at least, by military orders?

Ques. 7. From your knowledge of the city and vicinity, and the wants of the time referred to, was it not manifestly impossible for the timber in question to escape distruction outside of any military orders to cut it down?

61 Ques. 9. Is the close from where the timber was cut outside the corporate limits as then extended?

Ans. 1. I was appointed mayor in 1862 by the city council of Nashville, by an election of the two boards in convention. I was re-elected by the same body in October, 1862, 1863, 1864.

Ans. 2. The members of the two boards of the city council were appointed by Andrew Johnson, acting as military goveror, in April, 1862, Octo., 1862, Oct., 1863 & 1864. Members of the city council had no other authority to act than that they received, though their appointment by the military govenor. The only differance was that they were then appointed enstead of being elected as the charter required. They have the same power in either case.

Ans. 3. The city of Nashville was a military post at the time the wood was taken. The city was several times besieged, but what was its condition at that time I do not recollect.

Ans. 4. There were many refugees in the city and many poor people who were destitute for want of employment. Some of them were furnished with fuel and food by the military authorities.

Ans. 5. The military had nothing to do with the distribution of the wood, it was given to the poor and even to others that had property, but no money, and sold to others that had money to buy, and a
62 portion of it was taken to the water works. The distribution of the wood was superintended and controlled by myself, as mayor, and the presidents of the two boards of the city councils, and also by some of the councilmen and aldermen of the different wards. The money received by Ja's C. Smith for the wood was used by him in paying the expences of hauling, cutting, &c., and was accounted for by him as the agent of the city.

Ans. 6. The military authorities supplied no wood for the water works until June or July, 1864. The military had nothing to do with the taking of the Merritt wood to the water works. It was hauled there by wagons employed by Jos. G. Smith.

Ans. 7. There was at the time a great demand for wood, and people were taking and cutting it off whereever it was convenient, and nothing but the most stringent measures restrained them.

Ans. 8. My recollection is that F. R. Rains was paid two dollars and a half per cord for the wood cut on his lands. I thought it was a reasonable price under the circumstances. The government was at that time only paying one dollar per cord for wood. The land on which the wood was cut lies just outside the southern boundary line of the city.

Ques. Do you know of any of the money received by any of the parties for wood cut being paid into the city treasury at any time?

Ans. I do not; but I do know that the city council expected
63 and required of Jos. G. Smith an account of his agency in the wood department. I recollect that many of his wood-choppers were paid off, for wood cut, in the treasurer's officers.

The above deposition is taken subject to all legal objections.

JOHN REID.
JOHN LELLYETT.

The above deposition was taken at the time of the taking of the deposition of James Lester, and certified in same certificate of the clerk of the circuit court of Davidson County, on page of this transcript.

Testimony of Isaac Paul.

Plaintiffs introduced and examined ISAAC PAUL:

Witness lives about half a mile from the tract of land of Merritt from which the wood was cut; has so live about 34 years. Said place is in view of witness's house, and witness is well acquainted with it and with

the plaintiffs. Witness knows when the wood was cut from said place. It was in the fall of 1862, while General Negley was in command of the post of Nashville. Witness got some 12 or 15 cords of the wood; thinks he bought some of it from John L. Stewart. It was understood that Stewart and the hands under him were cutting the wood for the corporation of Nashville. Wood was at the time very scarce and high in Nashville, and people had to get wood where they could. Stewart
64 had a company of hands cutting under his superintendance; there were a good many wagons and teams hauling wood from the place, and they were hauling it to town. Witness paid $6 per cord for the wood bought of Stewart, but men who were hauling wood to the city got at times as high as $10 and $12 a cord for it. The city was surrounded by confederate cavalry and parties, and a confederate force was near, and this prevented wood coming to the city; so that at times it even sold as high as $20 and $15 per cord. Witness lives within about a quarter of a mile of Fort Negley. At one time, about the time the wood was cut, a party of confederates came close enough to draw the fire of Fort Negley. Witness remembers that on that occation a ball from the confederates struck the railroad within a few hundred yards of Fort Negley. Merritt's grove was cut about Octo., or Nov., 1862. About that time a large confederate force concentrated at Murfreesboro, 30 miles south, and soon after that the great battle of Stone's River was fought. Witness was at Merritt's grove a good many times during the cutting, chiefly while getting the wood for witness's own use; went through there several times afterward; saw the soldiers hauling some large logs from that place to the fort, but cannot tell how many were so taken. At another time, when the wood was nearly all gone, saw
65 the soldiers tying up the smaller branches of the trees in bundles with wire. Witness would think there might be a hundred cords of these bundles of branches. Merritt's grove was within a few hundred yards of Fort Negley. Witness thinks no part of it was more distant than a quarter of a mile. The wood would of course afford a cover to an enemy. There were trees on the side of the hill between Fort Negley and the Merritt grove. The grove or wood of Merritt spoken of, and that of Mrs. Horton, Mr. Moore, Mr. Hamilton, and Judge Humphriegs, lay joining each other, between the Nolensville and Franklin turnpikes, forming one continuous woods.

Testimony of W'm Dews.

Plaintiffs introduced W'M DEWS:

Witness knows the Merritt woods in question. Witness runs wagons as a business; remembers when Merritt's woods were cut down, and helped haul it to the city. Witness hauled somewhere from 250 to 300 cords of wood from said land to the city water works and to Kelly's wood yard in the city, and from the latter place to various points in the city where it was ordered by Kelly to be hauled. Kelly said he was acting for the corporation. His wood yard was the place where wood was deposited, and from where it was distributed to the poor and to others. Some of the wood was sold to those who were able to buy. The hands were paid by Kelly at his wood yard, and money was
66 received there for wood. The wood was cut under the superintendance of John L. Stewart, who said he was attending to it for the corporation. Witness was employed to haul by John Hugh Smith, then mayor. Joseph C. Smyth had a general superintendance of the cutting and distribution of the wood, and was acting for the corpora-

tion. Witness heard said Smith give directions to Kelly about paying hands, &c. A good deal of the wood witness hauled he hauled to the city water works. Witness saw Peter P. Vaughn's wagons and others hauling wood from Merritt's land to the city at same time. Vaughn had more wagons than witness, and witness thinks he hauled more wood. Witness saw no one hauling wood from the Merritt land but the hands under Stewart; others may have hauled from said land beside those under Stewart, but if so witness did not see them. Stewarts sent tickets by the drivers, which were signed at the wood yard and returned to Stewart. Stewart kept an account in a book which he kept for the purpose. Witness was absent a few days on a trip to Columbia, and quit before all the wood was cut. Witness does not know the exact lines of Merritt's land, except one shown by Stewart at the time.

Testimony of Starkey.

STARKEY, witness for plaintiffs:

Witness knows the Merritt lands in question; was employed to
67 cut wood there in the fall of 1862, about the last of October; cut wood there from the beginning until all was gone; was employed by John L. Stewart, who said he was acting for the corporation; was engaged in cutting a month or six weeks; there was some 18 or 20 acres of the grove cut down. Witness thinks the wood would yield 45 or 50 cords per acre; was paid by Stewart and Kelly; saw some other persons not under Stewart's employ cutting brush and chunks. Witness never saw Stewart's hands taking any fence, and they did not do it while witness was there. Stewart kept an account of the wood in a small book. The woods witness speaks of as Merritt's extended as far as the woods extended westwards; never saw any of the woods or trees taken by the soldiers, except some of the branches, which was tied into bundles by the soldiers. Some of the large trees were at one time left, but were afterwards cut by the hands under Stewart.

Testimony of Eli L. Woods.

ELI L. WOODS for plaintiffs:

Witness knows the time in question; heard they were cutting Merritt's woods, and went and talked to John Hugh Smith about it; got an order from John Hugh Smith for half a cord, which plaintiffs got from Kelly's wood yard, and afterwards bought a cord there and paid for it. Wood was selling from ten to twelve dollars a cord, but got much lower
68 after a while; it got done to $5 or $6; about four and a half or five before the war, delivered in the city.

Testimony of M. Lester.

MADISON LESTER for plaintiffs:

Lives close by the Merritt place; lived that at time in question. The wood was cut by hands under Stewart, who said he was acting for corporation. Bought two cords of wood from Stewart and paid him six dollars a cord for it. Wood was selling in town at the time at ten or twelve dollars per cord. Saw nobody getting wood there but the hands under Stewart. Never saw any soldiers take any of the trees. His house adjoins the Merritt woods.

Van Alley, witness.

VAN ALLEY for plaintiffs:

Witness hauled wood from Merritt lands in fall of 1862, in October or November; had some days two four-horse wagons; hauled three loads a day, and sometimes as many as five. Cannot tell how much he hauled altogether. Hauled from 3 to 5 loads a day with each wagon. Was hauling some 28 days. Was absent some 3 days, on a trip off, but does not include that time in the estimate.

The defendants introduced and read in evidence—

1st. The proclamation of Andrew Johnson, military governor of Tennessee, of April 7, 1862, as follows:

69 "*Proclamation of military governor.*

"Proclamation.

"Whereas, at an election held in the city of Nashville on the last Saturday in September, 1861, for the purpose of electing a mayor, aldermen, and common council for said city, the following officers were elected to the respective offices, to wit:

Richard B. Cheatham, mayor.	
For alderman of the 1st ward	John E. Newman.
For councilmen of the 1st ward	John Coltart and John Hooper.
For alderman of the 2rd ward	James T. Bell.
For councilman " " "	Geo. S. Kinney and Charles S. Thomas.
For alderman of the 3rd "	Peyton S. Woodward.
For councilman " " "	L. F. Beech and W'm Shane.
For aldermen " 4th "	James M. Hinton.
For councilmen " " "	Cha's E. H. Martin and W. R. Demumbrane.
For aldermen " 5th "	W'm S. Cheatham.
For councilmen " " "	J. P. Coleman and W. H. Clemons.
For aldermen " 6th "	B. S. Rhea.
For councilman " " "	John J. McCann and Ja's Haynie.
For alderman " 7th "	A. H. Hurley.
For councilman " " "	Isaac Paul and F. O. Hurt.
For aldermen " 8th "	C. K. Winston.
For councilman " " "	John E. Hatcher and C. A. Brodie.

"And whereas the following persons of the aforenamed, to wit, R. B. Cheatham, mayor; James T. Bell, P. S. Woodward, James M. Hinton, B. S. Rhea, A. H. Hurley, C. K. Winston, John Coltart, John Hooper, Geo. S. Kinney, C. S. Thompson, L. F. Beech, Cha's
70 E. H. Martin, W'm R. Demumbrane, Jordan P. Coleman, W. H. Clemons, John J. McCann, James Haynie, Isaac Paul, F. O. Hurt, John E. Hatcher, and C. A. Bodie, have heretofore failed, and now refuse, to come forward and be qualified according law, by taking

the oath prescribed in the 10th article, section 1st, of the constitution of the State of Tennessee, and therein have manifested such disloyalty and enmity to the government of the United States as renders it unsafe for the public good that they should exercise the functions of the offices aforesaid:

"Now, therefore, I, Andrew Johnson, govenor of the State of Tennessee, by virtue of the power and authority in me vested, do declare the aforesaid offices vacant; and such persons above mentioned are hereby enjoined from exercising the functions of said offices, or performing any of the duties thereof, or receiving the emoluments of the same from this day.

"And the following named persons are hereby appointed and commissioned, after being duly qualified, to perform the duties of said offices as required by law, and receive the profits and emoluments thereof, until their successors are elected, to wit:

Councilman for 1st ward	William Roberts.
Alderman for 2rd "	Jno. Hu. Smith.
Councilman " " "	Charles Walker.
Alderman " 3rd "	G. A. J. Mayfield.
Councilman " 3rd "	K. J. Morris.
71 Alderman for 4th ward	M. M. Monehan.
Councilmen " " "	Lewis Hough and M. Burns.
Councilmen for 5th ward	Joseph B. Knowles and W. P. Jones.
Alderman " 6th "	M. M. Brien.
Councilmen " " "	T. J. Yarborough and W'm Driver.
Alderman " 7th "	M. G. L. Claiborne.
Councilman " " "	W'm Stewart.
Alderman " 8th "	Jos. C. Smith.
Councilmen " " "	James Cavert.

"ANDREW JOHNSON.

"By order of governor:

"EDWARD H. EAST, *Secretary of State.*

"NASHVILLE, *April* 7, 1862."

2nd. Proclamation of same of October 1st, 1862, as follows:

"*Proclamation of the governor.*

"By virtue of the power and authority in me vested as military governor of the State of Tennessee, I do hereby appoint the following persons to hold and exercise the functions *and exercise the functions* of the respective offices attached to his and their names:

"First ward—John Carper, alderman; James Turner & W'm Roberts, councilmen.

"Second ward—James J. Robb, alderman; G. M. Southgate and W'm Myers, councilmen.

72 "Third ward—Ed. Malloy, alderman; Andrew Anderson and Alex. McDaniel, councilmen.

"Fourth ward—H. G. Scovel, alderman; L. B. Huff & Cha's Sayers, councilmen.

"Fifth ward—W. S. Cheatham, alderman; J. B. Knowles and W. A. McClelland, councilmen.

"Sixth ward—M. M. Brien, alderman; T. J. Yarborough and W'm Driver, councilmen.

"Seventh ward—M. G. L. Claiborne, alderman; W'm Stewart and Thomas Cready, councilmen.

"Eighth ward—Jos. Smith, alderman; W'm Hurley and W'm South, councilmen.

"In testimony whereof I have hereunto set my hand and caused the great seal of the State to be affixed at Nashville, this Octo. 1, 1862.

"ANDREW JOHNSON,
"*Governor.*

"EDWARD H. EAST,
"*Secretary of State.*"

"I, Andrew J. Fletcher, secretary of state of the State of Tennessee, do certify that the foregoing is a copy of a proclamation of Andrew Johnson, as millitary governor of Tennessee, appointing a board of aldermen, common council of the city of Nashville, the original of which is now on file in my office.

"In testimony whereof I have hereunto subscribed my official signature, and by order of the governor affixed the great seal of the State of Tennessee at the department in the city of Nashville, the 31st day of March, A. D. 1869.

[GREAT SEAL OF TENNESSEE.] "A. J. FLETCHER,
"*Secretary of State.*"

73 3rd. The order of Brig. Gen'l James S. Negley, which, being objected to for want of verification, defendants' attorney, John Lellyett, testified that he knew the signature of said Gen. Negley, and proved the signature to said order, which was then read in evidence as follows:

Order of Ja's S. Negley, brig. gen'l.

"HEADQUARTERS U. S. FORCES,
"*Camp Nashville, Tennessee, October* 15, 1862.

"Hon. JOHN HUGH SMITH:

"SIR: In reply to your statement that there are large numbers of poor loyal families who are suffering for the want of firewood, especially since the investment of the city by the enemy, which precludes the possibility of procuring fuel outside of our lines, Capt. Morton, chief engineer, has been directed to cut away the woods which obstruct the range of the artillery on the forts, or affords the enemy a consealment for defense. From the woods which have to be removed you can obtain a supply for the poor. But I would suggest the propriety of obtaining the wood strictly from rebel property. They alone are responcible for the misery which you propose to alleviate, and should provide relief.

"Capt. Morton will designate the ground he desires to be cleared for military purposes.

"I have the honor to remain, yours, very truly,

"JAMES S. NEGLEY,
"*Brig. Gen. Comm'd'g.*"

74 *Jos. C. Smith, witness.*

Defendants' witness JOSEPH C. SMYTH testified:

At the time in question John Hugh Smith mentioned to me that General Negley had offered to let him take the wood, which was ordered to

be cut down near the forts, to distribute to the poor. I advised him to accept the offer. He asked me if I would take charge of the matter. I answered that I would. He then directed me to go to Capt. St. Clair Morton, who would show me what timber had been ordered to cut down. I accordingly went to Capt. Morton for that purpose. Capt. Morton went with me over the ground and showed me the grove of Gibson Merritt in question in this suit, and also the adjoining woods of Mrs. Horton, Moore, and Humphreys, as the woods that was to be cut. I then reported again to John Hugh Smith that the wood to be cut down had been pointed out to me. John L. Stewart was employed to take immediate charge of the wood-choppers. A lot of hands were employed and put to work under Stewart; and we cut and hauled to the city until nearly all the trees were cut down off the Merritt place. But when I first went out to Merritt's woods I observed that most of the large trees had been cut by the U. S. forces already, who took the large trunks for the forts. The government continued to take such timber as was wanted for the forts. There were also other persons not under Stewart's
75 employ or command who got wood from the place. I cannot tell what proportion of the whole amount of wood was taken by the government for the forts, and by others than those under Stewart; but from my best recollection of the amout taken at the time, the wood taken by Stewart was from four to five hundred cords from the land of Merritt. Stewart kept an account in a book, here shown, (witness was shown a memorandum-book;) looks like it, and is the book I afterwards was shown by John Hugh Smith as Stewart's book; but I cannot say of my own knowledge that it is the same book Stewart kept. Stewart died soon after the wood was cut, in the early part of 1863. The cutting was begun in the latter part of October, 1862, and continued on this land about three weeks. I think we left about fifty trees standing when the cutting under Stewart ceased. Outside of Stewart's book I had at the time some count of the wood taken from Merritt's land, and according to my best recollection it was between four and five hundred cords. The wood was hauled to the city and distributed to the poor, and sold to those who could pay for it. The money received for the wood so sold was paid to the wood-choppers. None of it was paid into the city treasury.

76 Witness cannot say that he knows, otherwise than by Stewart's book, the amount of wood taken, but states his best recollection from such account as he had at the time from the tickets passed and the settlements made with choppers and haulers.

WILLIAM DRIVER, witness for defendants, testified:

I know the Merritt land, and know of the wood-cutting in question. Having heard of the wood being condemned, I went out on the land before any of the hands under Smyth had begun to cut. I saw some of the timber was already cut down. Capt. Page's company of federal soldiers were hewing logs on the land for palisade for the forts. They were then hewing a few logs on the land, and had a large number which they had drawn on to an adjoining lot. This was continued, but to what extent I do not know. I heard Capt. Page order that the trunks of the large trees should be left for his force for the forts, but do not know whether or not his orders were obeyed. The wood in question lay near the fort, and would have afforded a good cover to an enemy. The enemy were near at the time, and I considered the city invested. The force at that time investing the city were small forces that would appear at one place on one day and capture a wagon and a man, and on the next

day would appear at some other place and make a similar capture,
77 and so on. The poor and all citizens were scarce of fuel, because of the enemy's force around the city. The U. S. forces would not permit wagoners, as a general thing, to bring in wood, for fear of their carrying supplies and information to the enemy. After the thing was all over Gibson Merritt presented his claim to a military commission, of which I was a member, claiming that the United States owed him $39,000 for the distruction of this wood, and for fences, corn, &c. He made oath (orally) that his said claim was a just one against the United States. I then went out on behalf of said commission and measured the stumps of the trees which were cut down, and from that measurement made an estimate of what the government owed him for wood. I have not the figures as to the number of cords, but the number of dollars allowed him was $946 for wood. We allowed either one dollar or one dollar and a quarter for the wood. If it was one dollar, it was 946 cords in all cut from the lands by all parties. If one dollar and a quarter it would be one-fifth less. We allowed one cord for every 18 inches diameter of stump. The city was so invested when the wood was cut that the troops were on half rations.

78 On cross-examination witness was asked if, on a former trial, he had not said that, in making the estimate of cords for the government, he had included the laps. Witness did not remember to have said so. If he did he only alluded to the small branches collected by the troops for fascines. Witness would say that more than 100 trees were taken for the forts. The persons manageing the wood-chopping sold some of the wood, and used the money to pay for cutting. There was a general rush made to this land, and wood was hauled off by various parties. It was not within the power of the corporation to prevent plundering. I saw every sort of waggon there hauling. The fences were mostly hauled to Fort Negley, but a portion remained till Hood's seige of Nashville in 1864, and were then taken by the soldiers to make abbattis.

James W. Hamilton's testimony.

JAMES W. HAMILTON examined for defendant:

Witness owned that part of the forrest in question which joined the Merritt woods on the south side. Learning that orders had been issued to cut down said woods, application was made on behalf of witness to Gen'l Negley. That officer required witnesse's timber to be
79 cut away, but gave an order that it be done by witness, and that witness might sell the wood for his own benefit. Witness cut and sold his own wood at $4 to $5 on the ground, and something more when hauled to the city. Witness saw that there were a good many common trespassers prowling about the neighborhood, not the hands under Stewart, while the timber of himself and Merritt was being cut, and repeatedly drove them from his (witnesse's) land. Witness had a military guard for that purpose.

Testimony of A. G. Byrom.

A. G. BYROM, witness for defendant, examined:

I went on the land about the time Stewart was leaving. Stewart ordered me to cut down some of the remaining trees, which was done, leaving very few standing. Stewart died in March, 1863, and soon after John Hu. Smith requested me to bring him Stewart's wood-choppers'

book. I got a memorandum-book and delivered it to Smith. I am Stewart's son-in-law. As I remember, the book did not look like the one shown. Witness thinks that the book kept by Stewart was a yellow-backed book.

Testimony of Felix Stewart.

FELIX STEWART, witness for defendant, testified:

80 I am a son of John L. Stewart; I was in the federal service, but was frequently with my father while he was chopping wood on the Merrett place, and various other places, from that time till his death, in March, 1863. On the Merritt place I saw large trees cut down and hewn for the forts. My father kept an account of his wood-chopping in a memorandum-book; I saw him using it while cutting the wood from Merrett's land; I know the book, and that it was his habit to enter in it the amount of wood cut by the various hands, and hauled by the waggoners.

Witness was shown a book, which, he said, was the book his father kept; that he knew his father's handwriting, and that the entries in said book were in his father's handwriting. Witness had often seen the book shown him, and knew it to be the book his father kept, and that it was in his father's coat pocket when he died; does not know that the account in the book is correct or not.

Defendants' attorney now offered the said book of account in evidence, which being objected to by the plaintiffs, and the said book being inspected by the court, was excluded by the court to which
81 ruling of the court, excluding said book, defendant excepted.

Deposition of Ja's S. Negley.

Defendant then read in evidence the following deposition of Gen. JAMES S. NEGLEY:

Interrogatory 1st. By defendant: You will please state your present residence and occupation.

Inter. 2rd. Please state if you are the identical James S. Negley who was an officer in the U. S. Army during the late rebellion; and, if so, state what was your grade or rank, as an officer, from time to time, during said war.

Int'r. 3rd. State whether or not you held command of the district or post of Nashville (state whether district or post) in the fall and winter of 1862-'3, or any part thereof, and what part, stating when you took command, and when you ceased to be in command, of said district or post.

Int'r. 4th. State if you have any recollection of the building of a certain fortification in the environs of the city of Nashville, (while you were in command of the post of Nashville,) on a hill known as Saint Cloud, near the city cemetery, the fort there erected being called Fort Negley; and, also, if you remember, the building of other forts on
82 adjoining hills.

Inter. 5th. If you remember the erection of these fortifications, state whether or not they were, at the time, in the bounds of your command; and state also how far your command and authority as an officer of the U. S. Army extended (if any) beyond these forts.

Inter. 6th. Please state what you remember of any orders given by you, or under your authority, in regard to the timber or forrest trees standing at the time to the south-southeast and southwest of these

forts, or anywhere near them, towards the country and not inward towards the town.

Inter. 7th. If you gave any orders, or if any were given under your authority, in regard to the timber groves or forrest trees spoken of in last interrogatory, please state to what distance from the forts the said orders were directed to operate, or by what rule were those who were to execute the orders to be governed in regard to said timber.

Inter. 8th. Who was the engineer under whose immediate supervision these fortifications were erected; and what was the extent of his authority?

Inter. 9th. State what you may know of any orders given by
83 said engineer in regard to groves of timber alluded to in interrogatories 6 & 7.

Inter. 10th. Is that engeneer yet living; and, if so, where is he, if you know; or, if dead, when and where did he die, if you know that?

Inter. 11th. Do you know whether or not any of the groves of trees alluded to in interrogatories 6 & 7 was situated on the land of Gibson Merritt, or lands occupied by him? If you are ignorant on this point as to the ownership of the property, give any description of it within your recollection.

Inter. 12th. Did the mayor & aldermen of Nashville, (that was the name of the city corporation,) or the mayor of Nashville, John Hu. Smith, have anything to do with the timber in question, or your order concerning it, or the cutting of it down; and, if so, under what circumstances did they become connected with it; what overtures, propositions, or requests did they lay before you on the subject; and state anything you may know of their connection with the transaction.

Inter. 13th. Was there any military necessity at the time in question for the cutting down of any timber near the forts? and, if so, please explain such necessity.

84 Inter. 14th. Please give the dates of any of your orders alluded to in the above interrogatories, or your answers, or indicate the time as well as you can from memory.

Inter. 15th. Did any of the orders given in reference to the groves in question embrace, or relate to, or affect the fences or walls on the property in question? If so, please explain that also.

Cross-examination by the plaintiffs:

1st. Is your recollection of the circumstances attending the cutting down of the Merrett woods by the defendant, the mayor & aldermen of Nashville, very clear and distinct?

2nd. Have the defendant, the mayor & aldermen of Nashville, or their agents or attorneys, written to you on the subject of your evidence, and have they written you a history of the transaction, as they remember it and insist it is, and what they wish to prove by you? If you answer yes, append said letters, or a copy of them, to your deposition; and if you have no copies, state the contents as fully as you can.

3rd. State in what direction the Merrett woods was from said Fort Negley, and how far from said fort was its nearest part and how far the fartherest.

85 Inter. 4th. State what woods was to the east of the fort, how far it was, and when and why was it removed.

Inter. 5. State what woods was to the west of the fort, how far it was, and when and why you had it cut down.

6th. State what woods was to the south, and how far off, and when and why you had it cut down.

7th. State whether or not the mayor, John Hu. Smith, or the mayor & aldermen of Nashville were a portion of the military forces of the United States.

8th. State whether or not you ever gave the mayor & aldermen of the city of Nashville orders to cut down and appropriate to their own use the timber standing on Merrett's land.

9. State if you had any authority or ever gave orders to one individual or corporation to take the private property of a citizen and appropriate it to their own use.

(Defendants' attorney to this question excepts, so far as it relates to this case, because what witness may have done or not done in other cases is not evidence in this. Lellyett, attorney.)

10th. State if the force under you was not sufficient to do all the work, such as cutting down timber, that you wished done.

11th. If you answer that you gave orders to the mayor & alder-
86 men of Nashville to cut down said timber, state whether or not you sent for them to have them do said work, or did they come of their own accord and get you to issue said orders, permitting them to cut down and take said timber.

12th. If you gave said order, state the date of the orders as near as you can.

13th. State if the army under General Rosecrans was around Nashville at that time. State when his army reached Nashville after coming out of Kentucky. State where the rebel army was at that time, and who commanded it. State at what time the rebel army reached Murfreesboro, and if the body of that army came nearer to Nashville than Murfreesboro. When was Bragg defeated at Murfreesboro and driven back?

14th. When did the mayor & aldermen complete the job of cutting down the Merrett woods, and when did they finish hauling it off? Do you know at this time, and did you ever know?

15th. After Gen'l Rosecrans reached Nashville from Kentucky, and while he was with his army between Nashville & Murfreesboro, did you ever have any serious apprehensions that the rebels would attack Fort Negley?

16th. Was it a matter of any importance, benefit, or advantage to the United States forces to have said timber removed from said
87 place after the timber had been cut down? If you answer yes, what?

17th. Were the forts much higher than the Merrett woods, and did not they completely command said woods, and could an enemy have been able, while the timber was standing, to have placed a battery in said woods? Could any force of the enemy have stayed in said woods?

18th. If the Merrett woods contained 20 acres, and there was in said wood from 1,000 to 1,200 cords of wood, how long would it have taken a full brigade or division, in anticipation of an immediate attack, to have cut down said timber so as to have prevented it from obstructing the range of the guns in the fort? Could it not have been done easily in a night or part of a day?

19th. Was it necessary to have the trees cut up and removed from the ground after they were cut down?

20th. If the trees had been cut down and the limbs and branches cut off, and all in that condition left upon the ground, would it not have impeded an attacking force; would not that have prevented an
88 attacking force from marching in line of battle over said place; and would it not have delayed them by breaking their column,

and in that way been a better protection than to have had the timber removed?

21. State if there was any necessity, at that time, to have the fence around Merritt's woods destroyed, and if you ever gave orders to the mayor & aldermen of Nashville to take Merritt's fences.

22. Does not the Tennessee and Alabama railroad run through the Merritt, Hamilton, & Horton woods, and did not Mrs. Hamilton, wife of James W. Hamilton, at the time the mayor & aldermen of Nashville were taking Merritt's woods, and were trying to get an order from you to cut and take the Hamilton woods, come to you for the purpose of preventing them from getting the Hamilton timber, and did you not at that time tell her that all you desired was to have a few trees cut down on the line of the railroad, so as not to obstruct the view?

23. Was not wood very scarce and high in Nashville at that time?

24. If it was necessary to have said timber cut down and removed at that time, why did you not order the owner to do it, so as to give him the benefit of his own timber?

25. Did you ever order or give permission to the mayor and aldermen of Nashville to take Merritt's fences and timber and appropriate them to their own use and not pay for them?

89 26. Was there not a large number of houses between the Fort Negley and the Merritt woods? If so, why did not the military necessity that demanded the cutting down of the trees, also demand the removal of the houses?

27. If there was a large number of houses between Fort Negley and the Merritt woods, how could there have been any necessity to have taken away the fences, and the timber that was lying on the ground on the other side of the houses from said fort, and left the houses standing?

28. Did not the mayor, John Hugh Smith, or the mayor & aldermen of Nashville, first suggest to you the idea of letting them cut the Merritt woods and the wood of others?

29. If portions of Merritt's woods was half a miles from the fort and the trees on it so thin on it as to scarce give shade for a pasture or yard, was there any necessity at that time to have them removed?

Defendants' attorney excepts to the 2nd cross-interrogatory above as clearly illegal—

1st. Because neither the competency nor credit of the witness can be affected in the least by anything which the mayor & aldermen, their agent or attorney, may have written to him.

90 2nd. Because any letter which the mayor & aldermen, their agent or attorney, may have sent to the witness of the character indicated in the question, cannot be produced in court as evidence for or against any of the parties.

Therefore defendants' attorney objects to the production of any such private letter, or a copy thereof, or a statement of its substance.

JOHN LELLYETT,
Attorney for Def'ts.

Answers.

Answer to—

Int. 1. By attorney of defendants: I reside in the city of Pitsburge, Pennsylvania; occupation, representative of the 22nd district of the forty-first Congress.

Int. 2. I am the person referred to in these interrogatories; was an officer in the U. S. Army during the late rebellion. I was commissioned with the rank of brigadier and major general of volunteers.

Int. 3. I assumed command of the U. S. forces at Nashville, September 6, 1862; relinquished command of the post shortly after the arrival of Gen'l Rosecrans.

Int. 4. Forts Negley and Cassino, with the line of works extending therefrom, were constructed under my directions.

Int. 5. I have stated accordingly. My authority extended to the rebel lines.

Int. 6. The forest trees in front of the fort and line of fortifications were partially distroyed and the timber removed to clear the line
91 of fire and to prevent the enemy from concealing his approach or using them as a cover.

Int. 7. The topography of the country determined the necessity of clearing the grounds of all obsticles in front. The salient point of our lines of defences and the most exposed was that between the Murfreesboro and Granny White pikes. Between these roads it was found necessary to remove the timber in certain directions to the distance of three-fourths of a mile. It should have been removed even further.

Int. 8. Capt. St. Clair Morton (topographical engineer) was entrusted with the immediate control of the construction. He received his authority from me. I acceded to his urgent suggestion to cut down the forests with great reluctance. Before giving the order I accompanied Capt. Morton over the ground to be assured, from my own observation, of the necessity of granting him permission to do so.

Int. 9. The forces available for military duty then under my command were inadequate to the requirements of the defence of the post. It therefore became necessary to hire and impress citizen laborers to
92 hasten the work of cutting down and removing the trees and fences. Capt. Morton availed himself of the services of the citizens.

Int. 10. Capt. Morton was killed in action later in the war; I have no data of the time or locality of his death.

Int. 11. The property designated as belonging to Gibson Merritt lay within the range of the fire of the guns of the forts. This fact rendered the removal of the timber necessary.

Int. 12. Military authority entirely superseed the legal powers of the mayor & aldermen and council of Nashville. I did not recognize the official action of either; I gave respectful attention to their private suggestions; but in no instance permited their opinions to control me. I believe the gentlemen representing the municipal authorities represented to me the suffering condition of the poor, and their inability to procure fuel. I recollect having directed a staff officer to make enquiry as to the destitution of the poor citizens; also authorizing Capt. Morton to pay for the impressed labor, and furnish fuel from the timber he was cutting down to those who were unable to procure it otherwise. I believe Capt. Morton made the necessary provisions for the distribution of fuel to the destitute.

Int. 13. To deprive the enemy of the advantage of protection
93 from our view and fire; also, of the means of easily concealing his movements I have stated explicitly the custom and military necessity of removing all obsticles within the range of our guns.

Int. 14. The records of the post were turned over to my successor when I relinquished the command. I cannot now supply from any other source the precise dates or purport of orders issued in the fall of 1862.

Int. 15. The walls and fences before the entrenchments, to the distance of three-fourths of a mile, came under the designation of objectionable obsticles; they could have been readily used by the enemy to

cover his operation. Protection to private property was given in every case when it did not conflict with the material interests of the service.

Answers to cross-interrogatories by the attorney of the plaintiffs:

Int. 1. I recollect distinctly the circumstances which occationed the removal of the forests in the vicinity of Forts Negley and Cassino; but I do not know whether the mayor and aldermen of the city of Nashville cut timber on the property of the plaintiffs in this cause; of this fact I am confident, that they could not have done so without permission from Capt. Morton, who was in charge of this matter, and who
94 had been *been* directed to prevent all parties, excepting the troops, from cutting or removing the timber without his permission.

Int. 2. My evidence in this case is induced from my own recollection of the facts. This I stated would be the case, in reply to a written enquiry from the attorney of the defendants. I attached no importance to his letter, consequently distroyed it.

Int. 3. I turned over to my successor in command the diagram of the plan of fortifications—the lineal measurement, with a sketch of the topography of the country. The timber distroyed was situated on the east and south front of the line of intrenchments.

Int. 4. For the reasons given before, I am unable to give the distances referred to with accuracy. The timber was removed because it afforded a cover and protection to the enemy.

Int. 5. I have stated explicitly that I cannot give the exact locality of the property of the plaintiff. I remember that it was located on the diagram of the system of fortifications; also that it was situated within the range of our guns. The timber was cut down because it was an obstructions to the military defences.

Int. 6. I have answered this in a previous interrogatory.

95 Int. 7. The mayor, John Hugh Smith, or the mayor and aldermen of the city of Nashville, were subservient to the military authorities, and were liable to perform military duty, if the commander of the post found their services necessary to the defence of the place, and thought he could trust them.

Int. 8. I have no recollection of having authorised the mayor and aldermen to cut timber on any particular peice of property. I remember to have stated to the mayor and other citizens that the poor of the city should be carred for by the municipal authorities; also, that fuel would be furnished, under the directions of Capt. Morton, from such timber as he desired removed for military advantages.

Int. 9. I have already given an interpretation of my military authority.

Int. 10. No. Most of the labor which was done on the fortification was either hired or impressed.

Int. 11. I have given the substance of the interview with the city authorities relative to a supply of fuel to the poor.

Int. 12. I have now no means of ascertaining whether such an order was issued; my impression is that it was simply an intimation that the city authorities would be required to provide fuel for the suffering.

96 Int. 13. No; the advance of Gen'l Rosecrans' army reached Nashville on the 4th November, 1862. The rebel forces were under the immediate command of Breckinridge, who had his headquarters at Murfreesboro. The advance of the rebel forces under Bragg, after they reached Murfreesboro, were advanced to Lavergne and Tri-

une. Bragg was defeated at Stone's River, and driven back on the evening of the 2nd of January, 1863.

Int. 14. I am not aware of having given the mayor and aldermen the job of cutting wood on the lands of Mr. Merritt. I have stated that Capt. Morton was authorized to procure labor to hasten the completion of the defences. He has charge of the fatigue parties. If the mayor and aldermen had a "job" of cutting wood, it was through the agency of Capt. Morton.

Int. 15. No; on the contrary, I was making preparations to attack the enemy.

Int. 16. Yes; it was a matter of importance to have the timber removed after it was cut down. The fallen timber would have afforded a shelter to the enemy from the fire of the troops in the works.

Int. 17. It was not my custom to sacrafice the lives of my soldiers to protect forest trees, which is contemplated in your supposition,
97 that in case of an attack, a battery should have been sent outside of the entrenchments to prevent the enemy from availing himself of the timber.

Int. 18. If the woods were an obstruction—in this case they were—it became the duty of the officer in command to have the work done at once.

Int. 19. No; the prime object of the defence was to arrest the assailant beyond the line of woods, for when once within it he would likewise profit by the obj[str]uctions, to fight and advance under cover.

Int. 20. No protection would have been afforded by an abatis so far distant from the artillery. On the contrary, it would have lessened the effect of the fire from the guns in the forts.

Int. 21. It was necessary to remove the fences beyond the line of fire, although it was not done in every instance. I do not know whether they were removed by the mayor & aldermen, or others, under the sanction of Capt. Morton.

Int. 22. To the best of my recollection the railroad runs through these properties. This circumstance would increase the necessity for cutting down the timber and removing it from either side of the embankments. It was possible that I exhibited a reluctance to
98 have the forest distroyed, and stated Mrs. Hamilton that an effort would be made to preserve the timber upon her husband's property. Yet if the engineer deemed it necessary to cut the trees away, I should have approved of his action.

Int. 23rd. Yes.

Int. 24. I do not know whether Mr. Merritt applied for this priviledge.

Int. 25. If the mayor and aldermen, acting under my intimation, that they should furnish fuel to the suffering poor, and keep the city water works in operation, to cut wood off of the Merritt or any other property within the range of the guns of either of the forts, their actions met my approval, and were justified by the exergencies of the occation.

Int. 26. The houses could be destroyed in a few moments; their owners or occupants would have been subjected to great hardship and loss to have been compelled to remove before the safety of their lives made it necessary.

Int. 27. I stated the reasons for removing the fences and leaving the houses.

Int. 28. I have no recollection of having received any suggestions on the subject from mayor or council. I have stated that there were good and sufficient military reasons for the cutting down and removal of the

cover his operation. Protection to private property was given in every case when it did not conflict with the material interests of the service.

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Int. 27. I stated the reasons for removing the fences and leaving the houses.

Int. 28. I have no recollection of having received any suggestions on the subject from mayor or council. I have stated that there were good and sufficient military reasons for the cutting down and removal of the

forest trees in front of the defences, to the distance of three-
99 fourths of a mile.

JA'S S. NEGLEY,
Late Major Gen. U. S. V.

This was all the evidence in said cause.

The court charged the jury as follows:

Charge of the court.

From the nature of the defences set up by the defendants in this cause, and a tendancy of a portion of the proof offorded, as well as from the a[gree]*rgu*ment, the inferance may be draw that it is claimed on behalf of the defendants that John Hugh Smith and the two boards of the city council appointed in 1862, by Andrew Johnson, as military governor of Tennessee, occupied, in some way, a differant position to the corporation and to third parties from that which they would have occupied had they been elected by the inhabitants of the city, as prescribed by the charter of incorporation. But the court charges the jury that the officers referred to, though appointed by the military governor, and not elected under the charter, yet by virtue of such appointment became officers of the corporation, clothed with presisely the same powers, and subject to the same duties, as if they had been elected to the same places under the charter of the city; and that the corporation
100 which is defendants in this action is bound by the acts of said appointees, and their omission to act for their contracts, and their torts, in all respects in the same manner and to the same extent as it would have been if the said John Hugh Smith and the city council had been elected by the inhabitants under the city charter; and in any case where the corporation would become liable for either the contracts or torts of its agents, it is liable for the contracts or torts of these agents, to the same extent as for agents appointed under the city charter. But the court further charges you that a municipal corporation, as any other corporation, can do no act not authorized by its charter, directly or by implication; but if in the doing of some act, which the corporation may lawfully do, the agents of the corporation, by negligence or unskillfulness, or otherwise, tortiously so perform or fail to perform their functions as to cause an injury to third persons, the corporation becomes liable as the master or principal for the act of the servant or agent. As if in grading a street in the city, these defendants so
101 negligently or unskillfully do it as to work an unnecessary injury to the lots of citizens lying along the street, the corporation may be held liable in an action of trespass, or of trespass on the case, according to the circumstances. But the corporation of Nashville has no power, by law or under its charter, to go beyond its corporate limits and commit trespass and waste upon the lands of citizens of the county; therefore, it is unnecessary to consider whether or not the resolutions of the city council, offered in evidence, authorized those appointed to act under them to commit this trespass or not, so far as the count in trespass is conserned.

The city council had no power to authorise the commission of the trespass, and defendant would not be responcible for it as a corporation. As to the defence set up in this case, under the military order of Gen'l Negley, the court will charge you that such order, to constitute a valid defence in this case, must have been issued to subserve some military purpose. If you find from the proof that there was a military necessity to have the grove of Gibson Merritt, as it is called, cut down, then the

military commander had a right to order it to be done. And if he ordered defendants to cut it down, and they or their agents did it,
102 the military order would be a good defence in an action for the act of going upon the land and cutting down the timber. But it might be a military necessity that the timber should also be removed from the land after it was cut down, and if you find from the proof that such military necessity existed and that the military commander ordered defendants to remove the wood from said land, and they or their agent did remove it under such order, the order would be a good defence to the action to the extent that they are not answerable for removing the wood from the plaintiffs' land. But after the wood was so removed from the land of the plaintiffs it was still plaintiffs' wood, and if the defendants or their agents converted the wood to their own use or purposes the military order would not protect them in such conversion, and defendants are responcible to the plaintiffs for the conversion to the extent of the value of the wood at the time and place of conversion. The order of General Negley, commander of the post, constitutes no defence against the action for such conversion.

A juror enquired: What if Gen'l Negley required the corporation to keep the water works running?

103 And the court replied that the corporation was bound to run the water works without regard to such order, and this matter need not be considered.

As to the quantity of wood taken by defendants from said land the jury must ascertain that from the proof, as best they can, and as to the price the jury will allow the value of the wood at the time it was taken from the land.

Plaintiffs' attorney asked the court to direct the jury that they might allow interest in their descretion; which direction the court gave.

Defendants' attorney then asked the court to direct the jury as follows:

"If the jury find from the proof that the woods in question was condemned by the military commander to be cut down and removed, it became the property of the United States, and he might also order it to be taken by the city authorities to supply the destitute and to run the water works, and the persons so taking it took the property of the government and not of the plaintiff."

Which direction the court refused to give and defendants excepted.

Defendant's attorney then further asked the court to charge that—

104 "If the jury find that the other plaintiffs than Gibson Merritt joined in this action more than two years after the 3rd of March, 1863, and more than two years after the cause of action accrued, and if the wrongs complained of were done during the late rebellion, by persons acting under color of any authority dirived from the President, or under an order of a military officer of the United States having command of the place where said wrongs were committed, this action is barred as to them."

And the court refused to so direct, but on this point charged the jury as follows:

"If the jury find that this action was begun more than two years after the 3rd of March, 1863, and that the cutting down and removal of the timber was done under order of a military officer having command of the post, the action is barred as to these acts."

And the plaintiffs' attorney asked the court to direct the jury that said statute of limitation had no application to this case, because this is

not the class of wrongs intended to be protected by said statute. But the court charged the jury further that said statute fixed no limitation as to the time of bringing the action for the conversion of the
105 timber or wood after it was removed from the place from which the orders directed it to be removed, but it would bar the action of trespass.

The defendants' attorney then asked the court to further direct the jury, and began to read the directions which he requested the court to give, but was stopped by the court before concluding the reading of the directions with the remark that the court had already charged the law in defendants' favor.

Defendants' attorney then stated that he had several other directions in his hands which he wished to request the court to give to the jury, but the court refused to [hear] or consider any further requests on behalf of defendants for directions to the jury; to which ruling of the court, in refusing to entertain the requests of defendants' attorney, defendants excepted.

The court had delivered its charge to the jury, and had submitted the case to them, when the defendants' attorney reminded the court that it had not charged on the question of limitation, and asked an instruction upon that point, which was given, and then the defendants' attorney was proceeding to ask for several other written instructions, which the court declined to hear because they had not been asked for until after the charge was delivered, and it not being urged that the instructions proposed were upon points not already embraced by the original charges.

106 The jury found a virdict for plaintiffs, and assessed their damages at four thousand dollars.

Motion in arrest of judgment.

And afterwards came the defendants and moved the court in arrest of judgment for the following causes:

In this cause on the coming in of the verdict of the jury, the defendants come by their attorney, and moved the court in arrest of judgment, and show the following causes of arrest:

1st. For the joinder of counts in trespass, quare claussum frigit, trover, debt, and assumpsit in the same action.

2nd. For want of issue to the fourth plea of defendants.

Wherefore defendants pray that judgment on said verdict be arrested and withheld.

JOHN LELLYETT,
Att'y for Defendants.

Which motion was, on consideration by the court, overruled, and defendants excepted.

And afterwards defendants came, by their attorney, and filed in court the following agreement:

In this cause defendants came by their attorneys, and expressly
107 waived before the court all exception to the entering of judgment on the verdict of the jury rendered in this cause at the present term of the court, because of the failure of the jury in said verdict to indicate upon which count or counts in the declaration said verdict is found; but the court may assign said verdict to any count in said declaration on which, in the opinion of the court, such verdict could be

found upon the evidence in the cause; and this particular error, if error there be, is released, and none other.

JOHN LELLYETT,
BRADLEY & PEABODY,
Att'ys for Def'ts.

And judgment having been rendered on said verdict, defendants moved the court for a new trial; which motion was continued by the court till the next term.

And defendants tendered to the court this their bill of exceptions, which they pray may be signed, sealed, and made part of the record in said cause; which is done.

[SEAL.] CONNALLY F. TRIGG,
U. S. Dist. Judge.

On the 15th day of November, 1869, an entry was made overruling the motion of defendant for a new trial, viz:

Order overruling motion for a new trial.

GIBSON MERRITT ET ALS.
v.
THE MAYOR & ALDERMEN OF NASHVILLE.

Came the parties, by their attorneys, and the motion for a new
108 trial entered by the defendant at the last term, and continued over until the present term, is now by the court overruled.

Appeal bond.

Know all men by these presents that we, The Mayor and City Council of Nashville, William Dews, John Lellyett, D. F. Carter, and K. J. Morris, are held and firmly bound unto Gibson Merrett, A. G. Merrett, F. Hagan and wife C. H. Hagan, in the just and full sum of eight thousand dollars, to be paid to the said Gibson Merrett et als., their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals and dated this the 27th day of November, A. D. 1867. The condition of the above obligations is such, that whereas, lately in a suit depending in the circuit court of the United States for the middle district of Tennessee, between Gibson Merrett et als. and The Mayor & Aldermen of Nashville, a judgment was rendered against said Mayor and Aldermen of Nashville, for four thousand dollars, besides costs of
suit; and the said Mayor & City Council of Nashville having ob-
109 tained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Gibson Merrett et als., citeing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the 1st Monday in December next:

Now, if the said Mayor & City Council of Nashville shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

Mayor & City Council of Nashville,
By JNO. LELLYETT, *Att'y.* [SEAL.]
W'M DEWS. [SEAL.]
JOHN LELLYETT. [SEAL.]
D. F. CARTER. [SEAL.]
K. J. MORRIS. [SEAL.]

Signed, sealed, and delivered in presence of, and the foregoing bond approved this Nov. 27, 1869.

E. R. CAMPBELL,
Clerk U. S. Cir. Court Middle District of Tennessee.

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, Edward R. Campbell, clerk of the circuit court of the United States for the middle district of Tennessee, do hereby certify
110 that the foregoing is a true and perfect transcript of the record and proceedings had in said court in the case of Gibson Merrett et als. against The Mayor & Aldermen of Nashville, as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at office in Nashville, on this the 8th day of December, 1869, and the 94th year of American independence.

[SEAL.] E. R. CAMPBELL,
Clerk U. S. Circuit Court for the Middle Dist. of Tennessee.

(Indorsement on cover:) No. 422. The Mayor and Aldermen of Nashville, plaintiffs in error, vs. Gibson Merrett et als. M. Tennessee C. C. U. S.

Filed 18th January, 1870.